Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. .....

~~77~~-1288

JOHN PHILIP QUAGLINO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Three.

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vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Three.

JOHN PHILIP QUAGLINO, petitioner, prays that a writ of certiorari issue to review the judgment and decision of the COURT OF APPEAL OF THE STATE OF CALIFORNIA, Second Appellate District, Division Three, filed in this matter on September 30, 1977 which became final on October 31, 1977, and which the CALIFORNIA SUPREME COURT refused to grant hearing upon on December 15, 1977.

Opinion Below.

The unreported opinion of the COURT OF APPEAL OF THE STATE OF CALIFORNIA, Second Appellate District, Division Three, is attached hereto in the appendix to this petition.

Jurisdiction.

The opinion attached in the appendix hereto, which is sought to be reviewed was filed by the COURT OF APPEAL OF THE STATE OF CALIFORNIA for the Second Appellate District, Division Three, on September 30, 1977 and became final as to said Court on October 30, 1977.

A rehearing by the COURT OF APPEAL OF THE STATE OF CALIFORNIA, Second Appellate District on October 18, 1977 and a subsequent motion to vacate decision and to grant a hearing filed by new counsel was denied on October 28, 1977. On November 9, 1977 simultaneous petitions for hearing and for Writ of Habeas Corpus were filed with the California Supreme Court and denied on December 15, 1977 (the Petition for Hearing being denied by a four to three vote of the California Supreme Court).

The jurisdiction of this Court is invoked under the provisions of Section 1257(3) of Title 28 of The United States Code.

Questions Presented.

1. Does the hypnotizing of a key prosecution identification witness by the prosecution violate an accused defendant's Right to Due Process of Law under the Fifth and Fourteenth Amendments to the Constitution of the United States of America?

2. Can a State court allow the introduction of scientifically questionable testimony under any state sanctioned procedure without abridging the privileges and immunities of an accused under the Fourteenth Amendment to the Constitution of the United States of America?

3. Is a defendant in a criminal proceeding deprived of equal protection of the law under the Constitution of the United States where the mental impressions of a key identification witness are tampered with by the prosecution?

4. Is an accused's state granted right to appeal unconstitutionally inhibited where an issue of trial counsel's competency is raised and the accused is not placed on notice of the potential conflict by either trial counsel who is acting as appellate counsel or the court?

5. Where trial counsel fails to properly raise an appropriate objection to improperly admitted evidence which is clearly prejudicial, is the accused deprived of his Sixth Amendment right to effective assistance of counsel?

6. Can a conviction based on the hypnotically-induced testimony of an uncorroborated witness be upheld?

Constitutional Provisions Involved.

1. The Fifth Amendment to the Constitution of the United States of America provides in part that:

> No person shall be deprived of life, liberty or property, without due process of law; . . .

2. The Sixth Amendment to the Constitution of the United States of America provides in part that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . and to have the assistance of counsel for his defense.

3. Section 1 of the Fourteenth Amendment to the Constitution of the United States of America provides in part that:

> . . . No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case.[1]

On October 17, 1975, the District Attorney for the County of Santa Barbara filed an information with the Superior Court charging petitioner with violation of Penal Code Section 187 (murder) (CT 3). The first jury trial on this charge commenced on January 20, 1976 (CT 13). In connection with this trial, the Court ruled on several motions, including a motion to suppress identification and hypnotic intervention on a witness, Myron Jensen, the sole person to identify the defendant as a probable owner of the death car. The Court admitted the testimony (CT 18-19). The Court also denied petitioner's motion for change of venue and exclusion of testimony of witnesses concerning other conduct of petitioner, primarily directed toward the victim (CT 33). Much of this testimony was admitted. The jury divided eight (8) to four (4) for conviction and a mistrial was declared on March 10, 1976 (CT 48, stipulation filed May 14, 1976).

[1]For the Court's convenience, the following abbreviations are used throughout: RT refers to the Reporter's Transcript in the Court of Appeal from the third trial; RT1 refers to the Reporter's Transcript in the Superior Court from the first trial; RTA and RTB refer to supplemental transcripts which are part of the record in the Court of Appeal and include the evidentiary hearing on the defense motion to exclude identification evidence; Am.B. refers to Amicus Brief of the California Attorneys for Criminal Justice (CA/CJ) filed in the California Supreme Court; App.Am.B. refers to the Application of CACJ for permission to file Amicus Brief before the California Supreme Court.

The second jury trial commenced on April 1, 1976 (CT 51). All motions, oral and written, granted during the first trial were incorporated by reference in the retrial, upon stipulation of counsel (CT 79). The jury was again unable to reach a verdict and a second mistrial was declared, with seven (7) jurors voting for conviction, four (4) for acquittal and one (1) undecided (CT 70, stipulation, *id.*). Petitioner then moved for dismissal, but his motion was denied (CT 81).

The third jury trial began on July 27, 1976 (CT 83). Petitioner's motions, oral and written, made in connection with the first trial, were again incorporated by reference and the Court reiterated its rulings (RT 266-269). On September 2, 1976, the jury returned a verdict of guilty of first degree murder (CT 189). Judgment of conviction was entered on September 17, 1976, and petitioner was sentenced to life imprisonment as prescribed by law (CT 196, 191). Notice of appeal was filed the same day, after a motion for a new trial was denied.

Petitioner was represented through the three (3) trials, appeal to the Court of Appeal for the State of California, Second Appellate District, Division Three (hereinafter referred to as "Court of Appeal"), and motion for rehearing by James Westwick, Esquire, of Santa Barbara, California. Petitioner's opening brief was filed on March 4, 1977, consisting of thirty-one

(31) pages. Respondent's brief, one hundred twenty-three (123) pages long, was filed on May 29, 1977. Petitioner's reply brief, ten (10) pages long, was filed on August 18, 1977. A request to augment the record was filed on March 18, 1977 and partially granted on March 25, 1977. The appeal was argued on September 21, 1977, and the opinion of the Court of Appeal was filed nine (9) days later, on September 30, 1977. The decision was certified for nonpublication.

Petition for rehearing was filed with the Court of Appeal on October 11, 1977 and denied on October 18, 1977.

On October 20, 1977, new counsel was retained by Petitioner. Substitution of attorneys was executed on October 26, 1977 and was filed in the Court of Appeal, together with a motion to vacate decision and to grant a rehearing, on October 28, 1977, three (3) days before the decision of the Appellate Court became final. The motion was denied without opinion on the same day.

A petition for hearing from the appeal, the denial of the motion to vacate decision and from the judgment of conviction was thereafter filed with the California Supreme Court on November 9, 1977.

Thereafter on December 15, 1977, the California Supreme Court, having granted the California Attorneys for Criminal Justice the right to file an amicus brief which augmented the record with substantial scientific evidence attacking the reliability of hypnotically induced evidence denied a hearing with three Justices voting for a hearing.

Statement of the Facts.[2]

At approximately 6:30 a.m. on the morning of September 10, 1975, Dyanne Quaglino, the estranged wife of petitioner[3] was struck by a car and killed as she was jogging in a street, several feet from the curb. The car did not stop and there were no automobile skid marks in the area where the body was found. Based on statements of witnesses who had either seen Dyanne jogging or the car drive up the street (but none of whom saw the accident), the police located the car, a 1959 green and white Ford, that same evening behind the apartment complex where petitioner lived.

In May 1975, Myron Jensen sold the car for a friend to a person who identified himself as Richard W. Bellmore. The sale took place at Jensen's house. The purchaser drove away in a 1970 brown Chevrolet station wagon[4]. The purchaser returned to Jensen's place of employment to complain that the battery did not work; Jensen replaced the battery and gave him a smog certificate. There were two meetings between the purchaser and Jensen that day, and Jensen gave the purchaser a ride in his car on one occasion.

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[2]There appear to be no significant issues relating to the circumstances leading up to the death of petitioner's estranged wife, other than the identity of the driver of the death vehicle; therefore, factual recitation contained in the opinion of the Court of Appeal is relied upon and no direct references are made to the Reporter's Transcript itself.

[3]Dyanne had filed for divorce some five months before her death.

[4]The defense introduced evidence that petitioner neither owned nor had a car matching this description, or the description of the Ford.

On September 11, 1975, the Santa Barbara Sheriff's Department contacted Jensen and asked him to describe the purchaser of the car. The deputies showed him a 12-year old picture of petitioner and inquired whether the man in the picture looked familiar. Jensen said that the picture "struck a bell," but could not identify petitioner as the purchaser. The following weekend the deputies showed Jensen seven pictures of bearded men, none of whom he could identify as the purchaser.[5]

Jensen was contacted the following week by the deputies about undergoing hypnosis to improve his memory of the person who purchased the car. Jensen agreed and a Dr. Gott hypnotized him. Additional facts concerning the hypnotic procedure are stated elsewhere in the petition.

After Jensen came out of hypnosis, he was given seven photographs, including petitioner's picture which bore a similarity to the 12-year old picture previously shown to Jensen by the deputies. Jensen identified the petitioner as the person to whom he did or might have sold the car. Jensen then requested confirmation of his "identification" by way of a lineup where he again identified the petitioner. Jensen again "identified" petitioner in each of the three trials and in the preliminary hearing preceding them.

A fingerprint expert retained by the prosecution testified that numerous prints were removed from the car, and he formed an opinion that one "overlay" print was petitioner's. Two defense fingerprint experts and the deputy who first removed the prints testified that, although there were some similarities between the prints, they could not identify any fingerprint as petitioner's.

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[5]These pictures included a picture of Richard W. Bellmore, an out-of-state resident who was then a suspect in the case. Petitioner's (who is clean shaven) picture was not included.

The prosecution further introduced evidence that Dyanne and Petitioner were separated, were involved in divorce proceedings, and had had disagreements over child custody and property settlement. Several witnesses testified that, on several occasions, petitioner has threatened to hurt Dyanne. One witness testified that petitioner was going to get the children back one way or another, although petitioner's version was that he intended continuing efforts in the courts.

Petitioner testified in his own behalf. He denied that he had killed his wife. He stated that he was in bed with his girl friend on the morning of Dyanne's death. He stated that he had never purchased nor seen the 1959 Ford which caused Dyanne's death, and produced several witnesses to attest to the fact that no one ever saw him in or near such a car or the brown Chevrolet station wagon which was driven by the person who purchased the vehicle. He testified that he went jogging around 6:00 a.m. on the morning of Dyanne's death and returned approximately 20 minutes later. Petitioner's girl friend's testimony was read into evidence by the prosecution and the defense introduced her picture. She testified that petitioner was not breathing heavily when he returned from jogging that morning. When first questioned by law enforcement officers, however, she stated that the petitioner had not left the apartment at all. Petitioner was called by the Sheriff's office and told that Dyanne was killed in a hit and run accident.

Factual Background of Jensen's Identification.[6]

The car which struck Dyanne Quaglino, resulting in her death, was a 1959 Ford which, according to prosecution testimony, was traced to one Russell Atkins. Atkins had sold the car through a used car salesman, Myron Jensen (RT 224-225) to a man identified by Jensen, and Jensen alone, while subject to hypnotism as the petitioner herein. Consequently, Jensen's purported hypnotically-induced identification was critical to the prosecution's case in view of the disagreement of the witnesses on the question of fingerprints.

Jensen testified that he put the car up for sale, and an individual came to purchase it on a Friday evening, in May 1975, as it was "getting dusky." (RT 227:18, 225:22). The total transaction took fifteen to twenty minutes (RT 230:27). The purchaser returned with the car early the following Tuesday morning and reported that the battery was dead (RT 234:8-16). Jensen drove across town with the purchaser and arranged to replace the battery. The transaction on Tuesday morning took approximately fifteen minutes. Jensen replaced the battery, and the purchaser returned in the afternoon to pick up the car (RT 236-237). They spent at most five minutes on the third occasion (RT 238:22-23) and Jensen did not see the man again.

Some months later the police suspected involvement of the car in the death of Dyanne Quaglino. Two individuals were considered by Detective Baker, the

[6]Petitioner has, for the sake of convenience, adopted portions of the Court of Appeal Factual Recitation, petitioner did object to certain key portions of the opinion by way of petition for hearing. The People have, however, voiced or presented no objections to the factual recitations and are, therefore, bound by them.

primary investigating officer (RTB 40:24), to be suspects (RTB 42:25-43:10)—the petitioner, and one Richard Bellmore, whose name appeared on the documents transferring ownership of the car. A briefing session was held on September 11, 1975, at which time Detective Roger Best was assigned the responsibility of interviewing Jensen (RTB 3:24-4:4).

Detective Baker gave Detective Best a single photograph which he was told was a 12-year old picture of the petitioner (RTB 4-6)[7]. Detective Best testified that there were "any number of other photographs available" to him in the Sheriff's office, that it would have taken "very little time" to obtain photographs similar to that of the petitioner and that doing so would have involved a "relatively simple procedure." Best failed to do so only because he didn't think of it (RTB 26:1-17).

In the course of interviewing Jensen, Detective Best showed the Quaglino photograph to Jensen. Jensen was aware that he was being asked about the identity of the person who bought the car (RTB 30:9-31:6) and was told by Best, "Keep in mind that this picture may not be the present age. It may be old. It may be, you know, different." (RTB 102:1-2). Jensen said that the photo "sort of rings a bell" but that he couldn't remember the purchaser of the car well enough to identify him. He asked to look at the picture again but stated again that he couldn't identify the person in the photograph as the purchaser of the car (RTB 31-32). Jensen testified on a suppression motion as follows concerning the picture:

[7]Please refer to note 5, *supra*, the accompanying text. The picture was of a man without a beard.

A. I looked at it real close, and I said, "It does strike a bell, but I really can't tell you where, but it just strikes a bell to me."

Q. Could you connect that person with the sale of the automobile that Detective Best was asking you about?

A. I didn't—I mean, I couldn't then identify that as the man that bought the automobile, no. (RTB 102:9-15).

Because Jensen was unable to identify the purchaser of the car, the police decided to enhance his recall through the device of hypnosis and Deputy Gary Selk, a personal friend and former co-worker of Mr. Jensen (RTB 48:19-21, RTB 109:6-8, RT 248:16-19), was assigned the responsibility of persuading him to submit to a hypnosis session under Dr. Frank Storey Gott.

In the interim, Jensen was contacted by Baker and another officer and asked to look at a series of photographs of bearded men, one of whom was Bellmore; he didn't recognize any of these photos (RTB 107-108).

Detective Selk explained that the reason for hypnosis was that the police "were having an awful time tracing down who bought this car," and that the purpose of submitting to hypnosis was to improve his recall (RTB 109:11-12, 110:1-4). Jensen agreed to his friend's suggestion and appointments with Gott were arranged. Jensen was interviewed by Gott on Thursday, September 18, 1975 to see whether he was a fit subject for hypnosis (RT 325-326, RTB 126:17-28), and had a second appointment the following day to undergo hypnosis. At the first interview, Gott told Jensen that

hypnosis was used to improve recall for identification (RTB 127:14-20).

He once again met Detective Baker at the Jensen hypnotism session (RTB 126:4-16) and Baker was present throughout, slipping suggestions to Dr. Gott of questions to ask Jensen under hypnosis (RT 329:19-21, RTA 17:4-7, 18:24-27, 11:8-10).

Jensen was asked under hypnosis to recreate the sale of the car in his mind and to describe the purchaser. His description was essentially the same as he had given Officer Best (RTB 123:11-23). Dr. Gott told Jensen just before bringing him out of the trance:

> That he would remember the experience and the description of the man's features, and the stature and that he would remember it after the hypnotic session, so that he would be then better able to use it for identification. (RTA 12:20-25).[8]

Immediately after being brought out of the trance, Jensen was shown by Detective Baker a stack of photographs of men without beards, one of whom was the petitioner. Jensen picked out petitioner's photo as that of the purchaser of the car in words which Jensen remembered as, "That looks like the man that bought the car." (RTB 112:13, RT 255:20). Jensen attributed his asserted ability to identify the person to whom he sold the car to hypnosis (RTB 125:8-21, RT 257:21-24, RT 304:10-18). Thus, Jensen himself admitted that his identification of petitioner was "the product of the hypnosis." (RT 304:16-17).

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[8]Exactly what Dr. Gott told Jensen, and in what manner, was not part of the tape, so it was impossible for defense experts to validate the procedure. See page 16, *infra*.

REASON FOR GRANTING THE WRIT.

The present case presents this Court with a major issue concerning the integrity of our criminal justice system and the rights of an accused to be free from the tampering with the minds and thought processes of witnesses. The issues raised are nothing short of the issues of whether American Jurisprudence can survive the threat of "mind control and manipulation" at the hands of prosecutors, who when unable to piece together a conviction against a prime suspect resort to a technique which the weight of scientific evidence has held to be unreliable for retrieval of historically accurate facts and may in fact result in the distortion of such facts by implanting erroneous facts in the mind of a witness.

In the present action it is impossible to ascertain the prejudice to the petitioner caused by the manipulation and transgressions into the memory and thoughts of a key witness. It is enough to point out that, even with such manipulation and the failure of trial counsel to properly attack the damaging testimony, it took three trials to obtain a conviction at the hands of a highly skilled prosecutor with eight jurors having held fast for acquittal.

I.

There Is No Scientific Basis for the Acceptance of Hypnotically-Induced Testimony to Establish Facts in a Criminal Trial.

Dr. Martin T. Orne, Professor of Psychiatry at the University of Pennsylvania and current President of the International Society of Hypnosis, observed in his affidavit filed with the California Supreme Court in

support of the application of the California Attorneys for Criminal Justice to file an Amicus Curiae:

> In subsequent research we have repeatedly documented both processes occurring within the same age regression session: an apparent increase in recall *as well as an increased tendency to confabulate,*[9] *to make up suitable memories, using whatever information was previously available to the individual . . .*
>
> Because of these two tendencies which are facilitated by hypnosis, increased recall and increased confabulation, *it is extremely difficult to know which aspects of hypnotically aided recall are historically accurate and which aspects have been confabulated . . .* (Emphasis added).[10]

Hypnosis, by its very nature, is a process of suggestion. The classic works on the subject, by their titles indicate that suggestion and hypnosis are synonymous.[11] And as the prosecution's leading expert at the first trial herein said, "There is no hypnosis, there is only suggestion." (RT 110:11-12). It is not surprising, therefore, that the subject of hypnosis often comes to think, either voluntarily or through suggestion by the hypnotist, that false statements are true.

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[9]Confabulation is defined as the actions of a hypnotized subject to substitute appropriate details for facts which cannot, in fact, be recalled.

[10]App.Am.B.—App. p. 5.

[11]*E.g.*, Hill, *Hypnosis and Suggestibility, and Experimental Approach*, New York, Appleton-Century-Crofts, 1968, and Weitzenhoffer, *Hypnotism, an Objective Study in Suggestibility*, New York, Wiley, 1953. The prosecution witness studied Weitzenhoffer (RT 5).

Two glaring examples come to mind. In the first instance there is the case of a young girl who confessed under hypnosis to a murder she had nothing to do with.[12] Another example is a series of laboratory tests performed by Weinstein, Abrams and Gibbons in which false guilt was induced in experimental subjects through hypnosis and the subjects were so convinced of their guilt that they were unable to pass a lie detector test thereafter.[13]

The most famous case of a subject of hypnotism who imagined an event under hypnotism is that of "Bridey Murphy," a woman who supposedly was "age regressed" to a prior incarnation under hypnosis.[14] In fact, she had inserted into a memory bank facts which came from an entirely different part of her career. The case has led one leading authority on hypnosis to observe that the case:

> Shows that memories revived under hypnosis, no matter how convincing to the subject, cannot be trusted until verified by external criteria. The "will-to-believe" may be so strong in the hypnotist as well as in the subject as to give the impression of validity.[15]

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[12]See Margolin and Sinoway, "Hypnotically-induced False Confession to Murder: Preliminary Questions Regarding Consent, Admissibility in Evidence and Other Legal Issues," 3 California Attorneys for Criminal Justice *Forum* (1976), reprinted in Practising Law Institute *15th Annual Defending Criminal Cases*, 733 (1977), and ABA National Institute on Exclusionary Rules, program materials, March-April, 1977, Chapter 7, Section 3.

[13]Weinstein, Abrams and Gibbons, "Validity of the Polygraph with Hypnotically Induced Repression and Guilt," 126 Am.Jour. Psychiatry 143-146 (1970).

[14]Bernstein, *The Search for Bridey Murphy*, 1956.

[15]Hilgard, *Divided Consciousness: Multiple Controls in Human Thought and Action*, New York, Wiley, 1977, at p. 59.

There is extensive evidence in the literature that hypnosis may make subjects more confident in their recall without making them any more accurate. Hilgard,[16] for instance, has noted,

> Confidence by the subject in the accuracy of recovered memories does not guarantee their accuracy . . .

"Suggestion" is the name of the game in hypnosis, and it may lead without proper controls to deception of hypnotist and subject alike. The inherent unreliability of its results have been succinctly summarized as follows:

> The hypnotized subject's impulsion to produce expected responses, which even incorporates his own subjective conviction, may also be described as the subject's impulsion to validate what he believes the hypnotist expects. *Moreover, this tendency to validate the shared expectations is quite independent of the contents of these beliefs* . . .[17] (Emphasis added).

While there is a certain amount of folk wisdom to the effect that hypnosis improves recall, researchers have had little success establishing the truth of that

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[16]Ernest Hilgard, a prominent Stanford University psychologist, is the author of four books related to hypnosis: *Hypnotic Susceptibility*, New York: Harcourt Brace Javanovich, 1965. *The Experience of Hypnosis: A Shorter Version of Hypnotic Susceptibility*. New York: Harcourt Brace Javanovich, 1968. *Hypnosis in the Relief of Pain* (with Josephine R. Hilgard). Los Altos, Calif. William Kaufman, Inc., 1975. *Divided Consciousness: Multiple Controls in Human Thought and Action*. New York: Wiley/Interscicence, 1977.

[17]Shor, "The Fundamental Problem in Hypnosis Research as Viewed from Historical Perspective," in Fromm and Shor, eds., *Hypnosis: Research Developments and Perspectives*, New York, Aldine-Atherton, 1972, at 38-39 (Emphasis in original).

impression. The existence of improved recall remains seriously in dispute. Barber,[18] reviewing the scientific basis of this assertion in 1966, could write,

> A series of experiments has ostensibly demonstrated that recall of remote memories or of previously learned material can be facilitated by first administering a hypnotic induction procedure and then administering either (a) motivational suggestions for heightened recall or (b) suggestions to regress to the time of original learning. If these findings are valid, hypnotic procedures which include motivational suggestions or regression suggestions should prove useful in various situations, such as in psychotherapy, in producing heightened recall of important life-history material. However, the findings cannot as yet be accepted as definitive; all pertinent experiments conducted up to this time are open to one or more serious methodological objections.[19]

One classic paper has presented experimental evidence

> That much of the complex phenomenon which we call hypnosis may result from (a) the subject's preconceptions of what hypnosis is, (b) implicit

[18]Theodore Xenophon Barber is a leading authority on hypnotism. His works include *Hypnosis: A Scientific Approach,* New York, Van Nostrand-Reinhold, 1969, *LSD, Marijuana, Yoga and Hypnosis,* Chicago, Aldine, 1970, *Hypnosis, Imagination and Human Potentialities, infra,* and numerous research articles on hypnosis, some of which are listed in Hilgard, "Hypnosis," 1975 Annual Review of Psychiatry 19-44, at 37.

[19]Barber and Calverley, "Effects on Recall of Hypnotic Induction, Motivational Suggestions, and Suggested Regression: a Methodological and Experimental Analysis," 71(3) Jour. Abnormal Psychology 169-180, at 169 (1966).

> cues by the hypnotist as to what he thinks it should be, and (c) the particular techniques of trance induction.[20]

The state of the art in hypnotism is perhaps best summarized by Erika Fromm:[21] "Unfortunately, the method is easy to learn. But hypnosis is like a scalpel: you wouldn't want it wielded by your janitor, only by your surgeon."[22]

Perhaps the clearest expression of the inherent problems created by allowing the admission of hypnotically-induced testimony was summarized by Dr. Martin T. Orne at App. Am. B.—App. p. 6:

> . . . There is no way by which a psychologist or psychiatrist, even with the most extensive experience in the field of hypnosis, can differentiate between an actual memory or a confabulation in a particular case without independent verification. Thus, there are many instances when subsequently verified accurate license numbers were recalled in hypnosis by individuals who previously could not remember them; by the same token, however, a good many license numbers which witnesses recalled turned out to belong to individuals where neither they nor their cars could have been implicated. *Unfortunately, a witness who is uncertain about his recall of a particular set*

[20]Orne, "The Nature of Hypnosis: Artifact and Essence," 58 Jour. Abnormal and Social Psychology 277-299, at 277 (1959).

[21]Professor at the University of Chicago and editor of *Hypnosis: Research Developments and Perspectives,* New York, Aldine-Atherton, 1972.

[22]Quoted in Hilgard, "Hypnosis is no Mirage," 8(b) Psychology Today 121-128, at 127 (November 1974).

of events can, with hypnosis, be helped to have absolute subjective conviction about what happened, though the certainty can as easily relate to a confabulation as to an actual memory. (Emphasis added).

Because Mr. Jensen has now been subjected to hypnotism, it is equally difficult to determine if a visual examination of petitioner (as opposed to his photograph) might have in fact cleared petitioner in the absence of the intervention of the hypnotism at the request of Deputy Gary Selk, "a personal friend and former coworker." The effective destruction of Jensen's independent recall through hypnotism raises substantial questions of due process which petitioner contends require full exploration by this Court.

II.

Hypnotism of a Witness as a Form of Mental Coercion Cannot Survive a Due Process Attack.

This Court has established that the manner of conducting police lineup or showup procedures may be so "unnecessarily suggestive and so conducive to irreparable mistaken identification as to constitute a violation of due process of law, and that this issue of due process is to be determined on the basis of the totality of the circumstances.[23]

Where the procedure followed is unnecessarily suggestive and conducive to irreparable mistaken identification, the accused is denied due process.[24]

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[23]*Validity under Federal Constitution of Police Lineup or Showup Procedures—Supreme Court Cases,* 34 L.Ed.2d 839, 845 (1974).

[24]*Palmer v. Peyton,* 359 F.2d 199 (C.A. 4th 1966).

In the present action the only eyewitness to link petitioner to the death vehicle could not identify petitioner as the purchaser of the vehicle when initially approached by the police (RTB 102:9-15). When the police decided to attempt to use hypnosis, a personal friend and former co-worker was assigned the responsibility of persuading him to submit (RTB 48:19-21, RTB 109:6-8, RT 18:16-19). The witness' friend, who was a police officer, explained that the police "were having an awful time tracing down this car" and that hypnosis would improve the witness' recall (RTB 109:11-12, 110:1-4). A detective was present during the hypnosis session (RTB 126:4-16) slipping suggestions to the hypnotist (RT 329:19-21, RTA 17:4-7, 18:24-27, 11:8-10).

Because the witness himself admitted that his identification of petitioner was "the product of hypnosis," (RT 304:16-17) the validity of that procedure, and the effect of witness' post-hypnotic identification of the intervening showing of a single photograph by the detective was critical.[25] It is equally clear that, in the absence of a procedure that is by definition suggestive and somewhat manipulative, there would have been no indictment, no trial and no conviction of petitioner. The sole reason for hypnosis was the inability of the police to tie the crime to petitioner. To borrow the words of this Court in *Foster v. California,* 394 U.S. 440, 443 (1969):

> This procedure so undermined the reliability of the eyewitness identification as to violate due process.

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[25]See, *e.g.,* page 10, *supra.* This raises distinct issues from those involving the single photo above.

As in *Foster, supra,* the procedure followed by the police in this case made it inevitable that petitioner would be identified, notwithstanding the factual inability of the principal witness to make an identification without hypnosis.

It has been held by this Court that due process cannot be deemed to be satisfied:

> . . . by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through deliberate deception of Court and jury. . . .[26]

The prospects of the use of hypnotism to produce the results desired by the State to obtain a conviction are frightening and threaten the very integrity of our criminal justice system.

III.

There Was an Insufficient Basis for Admitting the Hypnotically-Induced Testimony.

The prosecution's hypnotist admitted that, in his two previous experiences with hypnotic identification, he couldn't say whether the procedure actually improved recall (RTA 34:1-25), and he conceded that hypnosis "is not infallible" (RTA 37:21) and that identification after hypnosis might be mistaken (RTA 38:2-4).

Further, the tape of the hypnosis session, which was admitted into evidence, contained neither the beginning of the session (in which the hypnotist allegedly placed the witness in a trance) nor the end, in which the witness was allegedly brought out of the trance and asked to identify the petitioner through a photographic

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[26]*Mooney v. Holohan,* 294 U.S. 103, 112 (1935).

"lineup" (RTA 42-43). Consequently, there was no way for the defense experts to independently verify that the hypnotist or the police used proper techniques before and after the hypnotic session.

In summary, the evidence shows that the purported identification was the "product" of the hypnotic session which was not subject to defense scrutiny, that it followed a showing of a single photograph of the petitioner to the witness, that materials for a multi-photo showing were readily available at the time, that the detective who had previously contacted the witness concerning identification, was present prior to, during and after the hypnotic session, that the tape of the hypnotic session was incomplete, that the experts disagreed as to the overall reliability of hypnosis, as to the impact of the intervening single-photo showing and as to the effect of an officer's presence at the hypnotic session, and that the prosecutor's leading expert witness at the first trial, not called at the trial from which petitioner appeals, had serious reservations about the entire procedure.

There are three (3) theories on which the hypnotically-induced identification should have been excluded: that it was "impermissibly" suggestive (*Simmons v. U.S.,* 390 U.S. 377 [1968]), that it was "unnecessarily" suggestive (*Stovall v. Denno,* 388 U.S. 293 [1967], *Mason v. U.S.,* 414 F.2d 1176 [App.D.C. 1969], *United States v. Fowler,* 439 F.2d 133, 134 [9 Cir. 1971], *People v. Greene,* 34 Cal.App.3d 622, 644-645), and that it was not validated in accordance with *Frye v. U.S.,* 293 Fed. 1013 (D.C. Cir. 1923) and *People v. Kelly,* 17 Cal.3d 24 (1976)).

As stated in *People v. Kelly,* 17 Cal.3d 24, 30, 130 Cal.Rptr. 144 (1976):

> Admissibility of expert testimony based upon the application of a new scientific technique traditionally involves a two-step process: (1) The *reliability of the method* must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly *qualified as an expert to give an opinion* on the subject. Additionally, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case (Citations omitted. Emphasis in original).

Moreover,

> California courts, when faced with a novel method of proof, have required a preliminary showing of general acceptance of the new technique in the relevant scientific community (*Kelly, supra,* 17 Cal.3d at 30).

In adopting the majority approach of *Frye v. United States,* 293 Fed. 1013 (D.C. Cir. 1923), the California Supreme Court noted:

> Several reasons founded in logic and common sense support a posture of judicial caution in this area. Lay jurors tend to give considerable weight to "scientific" evidence when presented by "experts" with impressive credentials. We have acknowledged the existence of a ". . . misleading aura of certainty which often envelops a new scientific process obscuring its currently experimental nature." [As stated in *United States v. Addison,* 498 F.2d 741, 744 (App. D.C. 1974)] "scientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury . . ." (*Kelly, supra,* 17 Cal.3d at 32. Citations omitted).

While the scientific community is totally opposed to the use of hypnotism for the retrieval of historical facts because of the very nature of the procedure, the insufficiency of the foundation laid by the prosecution gave an even greater basis for exclusion.

IV.

Failure of Trial Counsel to Adequately Object to the Use of Hypnotically-Induced Evidence Denied to Petitioner the Right to Effective Assistance of Counsel.

It is settled that a criminal defendant is entitled under the Sixth Amendment to the United States Constitution and under Article I, Section 15 of the California Constitution to the effective assistance of counsel. As this Court said in *People v. Ibarra,* 60 Cal.2d 460, 464, 34 Cal.Rptr. 863 (1963):

> It is counsel's duty to investigate carefully all defenses of fact and of law that may be available to the defendant, and if his failure to do so results in withdrawing a crucial defense from the case, the defendant has not had the assistance to which he is entitled (60 Cal.2d at 464, 34 Cal.Rptr. at 866).

If it can be shown that "the omissions of trial counsel involved a critical issue, and that such omissions cannot be explained on the basis of knowledgeable choice of tactics," *People v. Anderson,* 43 Cal.App.3d 94, 101, 117 Cal.Rptr. 507 (3d Dis. 1974), or that counsel's failings deprived the defendant of a crucial defense, *In Re Williams,* 1 Cal.3d 213, 81 Cal.Rptr. 784

(1969), then the petitioner was denied effective assistance of counsel.

Contrary to the assertion of the Court of Appeal that the error of counsel was not prejudicial, it was in all probability fatal to petitioner's case. It should be remembered that Jensen was the only identification witness. It is questionable whether as a matter of law the case could even have gone to the jury without his testimony. And it is highly questionable whether, if the *Frye-Kelly* issue had been timely raised, the People could have met their burden to admit Jensen's testimony, the hypnotist, or the tape of the hypnotic interrogation.

Petitioner's attorney at trial was also his attorney on appeal. Counsel on appeal raised the issue, apparently for the first time, of whether a proper foundation was laid at trial for admissibility of hypnosis evidence. Moreover, petitioner's attorney below failed to request as part of the record in this case either the transcripts of prior trials or the content of written motions, despite the fact that such a request is required by Rule 33 of the California Rules of Court, objections in the third trial were only incorporated by reference from the first two, and the legal issues on Jensen's identification of the petitioner were submitted on the briefs at the first trial.

Because of the above, the record before the Court of Appeal was totally inadequate. In particular, given incorporation by reference of objections not in the record, the Court of Appeal could not safely conclude, as it did, that the foundation issue had not been raised below. Moreover, because as the Court of Appeal noted, "[O]n appeal appellate counsel, who also represented appellant in trial, do not raise the issue of

Ibarra error," the petitioner was not represented on appeal as to the issue of ineffective assistance of counsel *at trial.*

In California, a right to effective assistance of counsel on appeal has been recognized. *In Re Smith,* 3 Cal.3d 192, 90 Cal.Rptr. 1 (1970). *Smith* held that:

> [T]he inexcusable failure of petitioner's appellate counsel to raise crucial assignments of error, which arguably might have resulted in reversal, deprived petitioner of the effective assistance of appellate counsel to which he was entitled under the Constitution. 3 Cal.3d at 202, 203.

In California, "Petitioner need not establish that he was entitled to reversal in order to show prejudice in the denial of counsel." 3 Cal.3d at 202. The standard is only one of an *arguable* ground for reversal.

Examples of ineffectiveness of counsel on appeal abound in this record. Most glaring are attorney Westwick's failure to request a record including all objections preserved from the first two trials in the third, a failure which made complete appellate review impossible. Another example is failure to preserve issues by requesting a rehearing as to factual matters in the Court of Appeal. That failing places the petitioner's newly retained counsel in the unenviable position of disagreeing strenuously with the Court of Appeal's interpretation of the record but being faced with the consequences.

Given all of the above, it was abuse of discretion for the Court of Appeal to refuse petitioner's new Counsel's request to vacate the decision and grant a rehearing or in the alternative to conditionally grant a rehearing to permit a showing of ineffectiveness of appellate counsel to be made.

Because, as the Court of Appeal noted, appellate counsel who were also defense counsel did not raise the issue of ineffectiveness of counsel at trial, the Court is asked to recognize in such cases the existence of a debilitating conflict of interest. California courts have stated, "An attorney owes the highest duty of fidelity to his clients." *Schullman v. State Bar,* 16 Cal.3d 631, 636, 128 Cal.Rptr. 671 (1976). An attorney must give his clients his undivided loyalty, and must not allow a conflict of interest without "full consent and full disclosure." *Ishmael v. Millington,* 241 Cal.App.2d 520, 50 Cal.Rptr. 592, 596 (3d Dis. 1966).[27]

At the trial level, it is recognized that conflict of interest constitutes a denial of effective assistance of counsel unless the record affirmatively shows knowing and intelligent waiver of the right to counsel free from that conflict. *People v. Thompson,* 13 Cal.App. 3d 47, 54, 91 Cal.Rptr. 341, 344-345 (2d Dis. 1970), *People v. Chacon,* 69 Cal.2d 765, 73 Cal.Rptr. 10, 16 (1968). Because this Court has adopted a standard of effective assistance of counsel on appeal almost exactly the same as that at trial, *Smith, supra,* it follows that where there are arguable issues of denial of effective assistance of trial counsel, appellate counsel who was also defense counsel has a debilitating conflict of interest and the appellant is entitled to a new appeal if the record does not reveal knowing and intelligent waiver.

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[27]See also *People v. Robinson,* 42 Cal.2d 741, 269 P.2d 6 (1954).

V.

This Court Is Not Bound by the Lower Court's Factual Determination Relating to the Denial of Due Process.

The unpublished decision of the Court of Appeal relies heavily on what it alleges to be an implied finding of the reliability of hypnotically-induced testimony.[28] Based upon such "implied finding", the Court of Appeal concluded it was bound on the issues before it and refused to consider petitioner's due process argument.[29]

Whatever may or may not have been the constraints placed upon the appellate courts of the State of California in reviewing the trial court's determination of this issue, this Court has, as set forth in *Napue v. Illinois,* 360 U.S. 264, 271 (1959) recognized its duty:

> . . . to make its own examination of the record when federal Constitutional deprivations are alleged.

In reaching such a position, the Court in *Napue v. Illinois, supra,* 360 U.S. 272 relied upon the earlier decision in *Niemotko v. Maryland,* 340 U.S. 268, 271 (1951) where it was held:

> In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.

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[28]See C.A. App. pp. 5-6.

[29]See C.A. App. p. 6.

In view of the fact that the sole testimony submitted by the prosecution to support a contention of lack of suggestibility was scientifically inaccurate, this court has an obligation based upon a long course of judicial precedent to reject the conclusions reached by the California Courts which have taken from petitioner his right to freedom without due process of law.

VI.

A Hypnotically-Induced Identification Cannot Support a Conviction Where Other Relevant Evidence Is in Conflict.

As set forth in greater detail above, the prosecution witnesses in this case admitted having shown the star witness, Jensen, a single photo of the defendant one week prior to his purported identification. The officer admitted that it would have been easy to obtain multiple similar photographs from the Sheriff's files for a photographic "lineup." It cannot be disputed, and was not, that the procedure was *unnecessarily* suggestive. Nonetheless, the trial court and the Court of Appeal both refused even to exercise discretion to make a factual finding on the latter issue (RTB 133-136, decision of the Court of Appeal at 5-6).

In *Stovall v. Denno*, 388 U.S. 293 at 302 (1967), the United States Supreme Court held that a pretrial confrontation would deny due process if it was "unnecessarily suggestive and conducive to irreparable mistaken identification." The *Stovall* test was applied in *People v. Caruso*, 68 Cal.2d 183, 65 Cal.Rptr. 336, 339 (1968), which is still good law. In *Simmons v. U.S.*, 390 U.S. 377, 384, 19 L.Ed.2d 1247, 88 S.Ct. 967 (1968), the Supreme Court, reviewing a photographic identification which took place prior to

Stovall, held that photographic identifications would be set aside if "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification," noting that this seemingly new standard "accords with our resolution of a similar issue in *Stovall v. Denno*." 390 U.S. 384.

This Court has recently expressed its reluctance to adopt a per se rule in the determination of the admissibility of evidence obtained under circumstances where the evidence may have been subject to some suggestibility if the totality of the circumstances surrounding such identification indicate the probability that the identification is valid.[30] In reaching its decision, the Court relied heavily upon the earlier analysis of Associate Justice Stevens in *United States ex rel. Kirby v. Sturges*, 510 F.2d 397 (1975) who observed at 510 F.2d 402:

> In *Stovall* the Supreme Court held that whether the confrontation conducted in a particular case is so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law . . . depends on the totality of the circumstances surrounding . . .

The Court in *Manson v. Brathwaite, supra*, did not however, totally dismiss its concern for the admissibility of potentially unreliable evidence as indicated by the Court's statements at ..... U.S. ....., 53 L.Ed.2d 152, where the observation is made:

> . . . the driving force behind *United States v. Wade*, 388 U.S. 218, 18 L.Ed.2d 1149, 87 S.Ct. 1926 (1967) and *Gilbert v. California*, 388 U.S.

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[30] *Manson v. Brathwaite*, ... U.S. ....., 53 L.Ed.2d 140, 97 S.Ct. ....., (June 16, 1977).

263, 18 L.Ed.2d 1178, 87 S.Ct. 1951 (1967) [right to counsel at a post-indictment line-up] and *Stovall,* all decided on the same day, was the Court's concern with the problems of eye-witness identification. Usually the witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress. *The witness' recollection of the stranger can be distorted easily by circumstances or by later actions of the police. Thus Wade and its companion cases* reflect the concern that the jury *not hear eyewitness testimony unless that evidence has aspects of reliability.* (Emphasis added).

The record in the present case, by contrast with both *Manson v. Brathwaite, supra,* and *United States ex rel. Kirby v. Sturges, supra,* is clear that there is simply no way to judicially (or factually, for that matter) determine the reliability of the hypnotically-induced identification which led to petitioner's conviction.

Dr. William S. Kroger, a prosecution expert on hypnosis who testified at the first trial in this case, testified that, "Intervening events can interfere with the validity or with the actual recall; specific recall" (RT 101:10-11) in hypnotic age regression. Certain segments of his testimony are worth quoting at length:

Q. You used the term "undue influence." It's true; isn't it, Doctor, that while hypnosis is capable of breaking down barriers, it is also subject to suggestion?

A. I don't know of anything that is not subject to suggestion.

Q. Neither do I, and that would include hypnosis; wouldn't it?

A. That's right. There is no hypnosis; there is only suggestion.

Q. And memory recall is also subject to the possibility of confabulation, isn't it?

A. That is correct.

Q. And confabulation is generally the construction of events that did not occur; isn't it; very generally?

A. Did not, or they think they occurred.

Q. They think they occurred. As an example, I might be hypnotized and asked who sat beside me on either side of me in my fifth grade class, and I might say, Susie on my left; Johnny on my right; while under hypnosis, and yet the fact that I said that Susie and Johnny sat in those respective seats would not prove that that was necessarily the fact; would it?

A. Not unless they were validated.

Q. In other words, the hypnotist would have to independently validate that Susie and Johnny did sit in those respective seats; wouldn't he?

A. That's correct.

Q. And that is because of the possibility of confabulation; namely, the ability of a person to think they saw something and they did not?

A. I don't think the term "confabulation" is quite correct, Counsel. I think probably a more apt term would be "misremember."

Q. Misremember. All right. I know what that means, too.

THE COURT: The other one, I assume you had to look up.

MR. WESTWICK: No, your Honor, I stole it from a psychiatrist who looked it up, as your Honor well knows.

Q. All right. A person may, under hypnosis, misremember circumstances or facts.

A. Always possible.

Q. All right. Isn't it also possible that persons may misremember in hypnosis because of a self-conscious desire to please the hypnotist, or some other person?

A. Yes, that's possible.

Q. If a person in a given hypnotic situation is somehow led to believe that the hypnotist wants a certain answer, or hopes for a certain answer, the element of suggestion may in fact precipitate that answer; might it not?

A. On the basis of minimal cues, it could.

Q. In other words, it would take some very adroit questioning to avoid such suggestion?

A. Well, it wouldn't necessarily have to be adroit.

Q. It would have to be more than minimal questioning; is that fair?

A. That's right.

Q. I take it that there have been any number of experiments conducted concerning information that was produced by a hypnotic recall; hasn't there?

A. Yes, there has.

Q. And in short, those experiments have indicated that the information that one may produce

through the technique of hypnotic recall in some instances that we've seen, it may be inaccurate; isn't that true?

A. That's correct.

* * *

Q. Well, let's go back to September 11th.

A. Okay.

Q. And suppose that, again, he's been shown this picture. And that when he comes in for hypnosis, he knows that he is again being asked if he can identify the person who sold the car, or to whom he sold the car. And again, he's, on September 11th, been shown a picture of an individual under circumstances when he knew that the individual might be thought by the police to be the person to whom he sold the car.

The hypnotist cannot remove that element of suggestion that has already been—

A. Imprinted. That is correct.

Q. He cannot remove it. (RT1 110-113, RT1 123-124).

Even Dr. Gott, the hypnotist, admitted that, in his two previous experiences with hypnotic identification, he couldn't say whether the procedure actually improved recall (RTA 34:1-25), and he conceded that hypnosis "is not infallible" (RTA 37:21) and that identification after hypnosis might be mist[illegible] (RTA 38:2-4).

Finally, it should be noted that the tape of the hypnosis session, which was admitted into evi[illegible]e, contained neither the beginning of the session (in [illegible]h Dr. Gott allegedly placed the witness in a trance) nor the end, in which Jensen was allegedly brought

out of the trance and asked to identify the petitioner through a photographic "lineup." (RTA 42-43). Consequently, there was no way for the defense experts independently to verify that Dr. Gott or the police used proper techniques before and after the hypnotic session.

When viewed against the weight of both scientific and legal authority in the field, the present case clearly raises questions of the most frightening magnitude when one realizes that petitioner herein is presently serving a life sentence as a result of an investigation device employed by the representatives of the state which is inherently unreliable.[31]

Viewing the totality of the admissibility of evidence resulting from the use of mind control devices in criminal cases, at least one standard text observes:

> This combination of truth and other matters may offer leads for further investigation, or material for psychiatric diagnosis and treatment, all of which may produce admissible evidence. But the statement made during the interview, when offered . . . in a criminal case, have been uniformly rejected on the basis of the hearsay rule, lack of scientific acceptance of the underlying premise, or absence of necessary scientific foundation.[32]

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[31]The Court's attention is specifically directed to the volume of authority set forth in McCormick's HANDBOOK OF THE LAW OF EVIDENCE 507-510, *Statements Made While Under The Influence of Drugs or Hypnosis*, §208 (2d Ed. 1972). The volume of evidence questioning the reliability should then be weighed against the apparent increased interest in hypnosis evidenced by the article by Martin Reisner in the November 1976 edition of Police Chief Magazine.

[32]McCormick, *supra*, at p. 509, *Cf., People v. Harper*, 111 Ill.App.2d 204, 250 N.E.2d 5 (1969) where suppression of evidence upheld.

Prior reported California decisions had consistently held testimony which was the product of hypnosis inadmissible. As early as *People v. Ebanks*, 117 Cal. 652, 49 Pac. 1049 (1897), the California Supreme Court ruled that expert testimony as a defendant's statements under hypnosis were inadmissible, holding that the trial court was right emphatically to declare that "The law of the United States does not recognize hypnotism." 117 Cal. at 665-666. In *People v. Busch*, 56 Cal.2d 868, 16 Cal.Rptr. 898 (1961), California again upheld suppression of hypnotism testimony.

In *People v. Modesto*, 59 Cal.2d 722, 31 Cal.Rptr. 225 (1963) the Court expressed concern over hypnotic interrogation which might be *improperly* considered as independent proof of the facts recited therein. 59 Cal.2d at 732-733 (emphasis added).

Thus, California had never before upheld the admissibility of hypnotically-induced evidence to prove the truth of the statements of an individual influenced by it. Cases in other jurisdictions are in accord. In *State v. Pusch*, 46 N.W.2d 508, 522 (N.D. 1950), despite a careful foundational offer of proof, expert testimony purporting to establish a defendant's innocence through the use of hypnosis was held inadmissible because "No case has been cited by either party relating to the admissibility of the evidence proffered and no case has been found. We think that the evidence was clearly inadmissible . . ." And recently, in *State v. Pierce*, 207 S.E.2d 414, 418 (S.C. 1974), the South Carolina Supreme Court held:

> It is the general rule that testimony as to the results of hypnotic examination is not admissible if offered for the truth of the matter asserted. [Citations] We have found no cases in which

> a court has upheld the admission or which has found it error to have excluded testimony of the results of hypnotic examination offered to prove the guilt or innocence of the accused.

While the Court of Appeal did cite several cases in which hypnotically-induced testimony was admitted, in none of these cases did the Courts allow the testimony without some verification of the facts being testified to.[33] In *Wyller* and *Jorgensen, supra,* Note 33, the courts explicitly withheld judgment as to the admissibility of statements made under hypnosis to prove the truth of the matter stated (*Wyller,* 503 F.2d at 510, *Jorgensen,* 492 P.2d at 315) that was an issue in the present case.

While in *Harding v. State,* 5 Md.App. 230, 246 A.2d 302 (1968) the prosecution was allowed to have the victim's memory enhanced, the Court did so with the recognition that:

> some authorities warn that fancy can be mingled with fact in some cases (246 A.2d 312).

Further, in *Harding, supra,* the Court also found:

> . . . (3) there was sufficient corroboration of the witness' testimony: . . . (c) the accused was seen . . . immediately prior to the time the crime was committed. In addition, a precautionary instruction was given. (246 A.2d 312).

By contrast, the only person who claimed to have seen petitioner anywhere near the death vehicle was Jensen, who admitted his inability to make an identification in the absence of hypnosis (RTB 102:9-15, RTB 125:8-21, RT 257:21-24, RT 304:10-18) and this transaction itself was some three and one-half months prior to the commission of the crime in question.

[33] *Wyller v. Fairchild Hiller Corp.,* 503 F.2d 506, 509-510 (9 Cir. 1974), *State v. Jorgensen,* 492 P.2d 312, 315 (Ore. App. 1971) and *Harding v. State,* 246 A.2d 302, 306-312.

Conclusion.

Petitioner has been convicted of a major crime and sentenced to life imprisonment based upon the identification of a witness who was incapable of identifying petitioner before the intervention of a Police hypnotist. Such a conviction represents the gravest threat to our criminal justice system which, if allowed to stand, will allow the regular manipulation of witnesses' minds in the future. Due process requires a reversal.

Respectfully submitted,

LAW OFFICES OF JEROME ZAMOS,
By JEROME ZAMOS,
Attorney for Petitioner.

APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

The People of the State of California, Plaintiff and Respondent, v. John Philip Quaglino, Defendant and Appellant. 2d Crim. No. 29766, Sup. Ct. No. 109524.

Filed: Sept. 30, 1977.

APPEAL from a judgment of the Superior Court of Santa Barbara County. Robert L. Trapp, Judge. Affirmed.

Westwick & Collison, R. James Westwick, Brian H. Burke and Robert J. Graham for Defendant and Appellant.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, Norman H. Sokolow and Roy C. Preminger, Deputy Attorneys General for Plaintiff and Respondent.

Defendant John Philip Quaglino appeals from his conviction on a jury verdict of first degree murder. (Pen. Code, §§ 187, 189.) The appeal lies. (Pen. Code, § 1237, subd. (1).)

Appellant contends that: (1) the single person photographic showup was unduly suggestive; (2) the prosecution failed to properly qualify hypnosis as a reliable scientific technique for improving recollection; (3) evidence of prior acts of appellant should not have been admitted by the trial court; (4) certain declarations of the victim should have been excluded as hearsay; (5) the method by which the jury venire was produced did not meet the statutory requirements; and (6) appel-

lant was denied due process when the trial court refused to dismiss the charges after two hung juries.[1] After examination of these contentions, we have determined for the reasons set forth below that they lack merit.

FACTS[2]

At approximately 6:30 a.m. on the morning of September 10, 1975, Dyanne Quaglino, the estranged wife of appellant,[3] was struck by a car and killed as she was jogging. The car did not stop and there were no automobile skid marks in the area where her body was found, which was unusual for this type of accident. Based on the descriptions of a witness who had seen the car drive up the street but who had not seen the accident, the police located the car, a 1959 green and white Ford, that evening behind the apartment complex where appellant lived. Tire tracks and glass found at the scene of the accident matched up with this car. Additionally, fibers from Dyanne's clothing were found on the car's exterior.

In May 1975, Myron Jensen, who worked at a Chevrolet dealership, sold the car for a friend to a Richard W. Bellmore. Jensen kept the car at his house

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[1]At oral argument appellant advanced for the first time a claim of error in the trial court having used CALJIC 2.62 in instructing the jury. We could refuse to consider this claim because of its tardiness. (See *People v. Superior Court On Tai Ho,* 11 Cal.3d 59, 68.) We have, however, considered it and reject it on the merits as a proper evidentiary basis existed for the instruction. (See *People v. Karsnok* (Sept. 12, 1977, 2 Crim. No. 29333, ... Cal.App.3d .....)

[2]We state the facts in the light most favorable to the People as the prevailing party below. (*People v. Vann,* 12 Cal.3d 220, 225.)

[3]Dyanne had filed for divorce approximately five months before her death.

and did not sell the car through the dealership. After agreeing to buy the car and arranging to pick it up later, the purchaser drove away in a 1970 brown Chevrolet station wagon.[4] Several days later the purchaser came to Jensen's place of employment and told him that the battery did not work. Jensen replaced the battery for him and gave him the smog certificates for the car.

The Santa Barbara County Sheriff's Department contacted Jensen on September 11 and asked him to describe the purchaser of the car. The deputies then showed him a 12 year old picture of appellant and asked him if he looked familiar. Jensen stated that the picture "struck a bell," but could not identify it. The following weekend the deputies showed Jensen seven pictures of bearded men, none of whom he could identify as the purchaser.[5]

The following week, the deputies and Dr. Frank Gott, a Santa Barbara psychiatrist, contacted Jensen about undergoing hypnosis to improve his memory of the person who had purchased the car. Jensen agreed and Dr. Gott hypnotized him. After Jensen came out of hypnosis, he was given a stack of seven photographs. He picked out appellant's picture as the man to whom he sold the car. At a lineup at the county jail a few days later, Jensen again identified appellant.

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[4]The defense introduced evidence that appellant did not own nor have access to a car matching this description.

[5]These pictures included the picture of Richard A. Bellmore, an out-of-state resident who was then a suspect in the case. Bellmore happened to be the last name of a male clubmate of appellant at business school.

A handwriting expert testified at the trial that it was highly probable that the person who had written "Richard W. Bellmore" on the transfer document was appellant. Since appellant refused to give a handwriting exemplar of the specific words, the expert could not give a more positive opinion.

A fingerprint expert testified that numerous prints were removed from the car and he formed the opinion that one of the fingerprints was appellant's. Two defense fingerprint experts, however, testified that although there were similarities between the prints, they could not positively identify the fingerprints as those of appellant.

The prosecution also produced evidence that Dyanne and appellant were separated, were involved in divorce proceedings, and had had disagreements over the property settlement and child custody. Several witnesses also testified that on several occasions, appellant had threatened to hurt Dyanne. One witness testified that appellant told him that Dyanne was an unfit mother and he was going to get the children back one way or another. Appellant also told one of Dyanne's friends that he was sorry he beat her.

Appellant testified in his own behalf. He denied that he had killed his wife. He stated that he was in bed with his girl friend, Sonia Gowda, on the morning of Dyanne's death. He got up to jog around 6:00 a.m. on the morning of Dyanne's death and returned approximately 20 minutes later.[6] At 7:15 a.m. the

[6]Sonia Gowda's testimony was read into evidence by the prosecution and the defense introduced her picture. She testified that appellant went out jogging the morning of his wife's death, but had not been breathing heavy when he returned. When first questioned by law enforcement officers, however, she stated that appellant had not left the apartment.

sheriff's office called and told appellant to come over to the house of one of Dyanne's neighbors. He was then told that Dyanne had been killed by a hit-and-run accident. Appellant stated that he had never purchased nor seen the 1959 Ford which caused Dyanne's death.

DISCUSSION

1. *The Identification by Jensen*

Appellant first contends that the single person photographic showup used by the deputies was unnecessary and unduly suggestive and therefore the post-hypnosis identification was tainted. As previously noted, Myron Jensen was shown a single photograph of appellant and he stated that it "struck a bell." Approximately a week later he underwent hypnosis and when he came out of the hypnosis he picked out appellant's picture.[7]

The United States Supreme Court and California courts have held that a pretrial photographic identification will be set aside on due process grounds when, in considering all the circumstances, "the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. . . ." (*Simmons v. United States* (1968) 390 U.S. 377, 384 [19 L.Ed.2d 1247]; *People v. Hicks*, 4 Cal.3d 757, 764; *People v. Pijal*, 33 Cal.App.3d 682, 689.) The trial court followed this standard in determining that the photographic identification procedure was not prejudicial. It impliedly found that the fact that Jensen saw appellant's photo-

[7]The picture which Jensen was first shown was taken approximately 12 years before the picture he identified after hypnosis.

graph in a one-man photographic showup prior to undergoing hypnosis did not give rise to a substantial likelihood of irreparable misidentification when after hypnosis Jensen identified appellant's photograph from a group of seven. If there is substantial evidence to support this finding, it is binding on appeal. (*People v. Greene*, 34 Cal.App.3d 622, 646; *People v. Guerin*, 22 Cal.App.3d 775, 779.)

At the hearing on the admissibility of this identification, three psychiatrists testified—one for the prosecution and two for the defense. Dr. Gott, the prosecution's expert who had also hypnotized Jensen, testified that the fact that Mr. Jensen had been shown the photograph would not affect his post-hypnosis identification because during the hypnosis session his mind was focused solely on the events surrounding the sale of the car. A later occurrence, such as the showing of this photograph, was not in his mind at the time of the sale of the car and thus would not affect his recall. The defense psychiatrists, Dr. Patterson and Dr. Wells, neither of whom had nearly as much experience with or confidence in hypnosis as Dr. Gott, did not agree with Dr. Gott and both indicated that the fact that Jensen had seen a previous picture of appellant might have influenced his choice after the hypnosis.

Dr. Gott's testimony, however, constitutes substantial evidence to support the trial court's finding. We are thus bound by it. Therefore, the single photographic showup did not taint Jensen's subsequent identification of appellant.

Appellant additionally contends that the prosecution did not establish that hypnosis has been accepted by the scientific community as a reliable technique

for enhancing recollection for identification of a suspect. (See *People v. Kelly*, 17 Cal.3d 24, 30; *People v. Law*, 40 Cal.App.3d 69, 85.) Appellant, however, did not raise this issue below. The prosecution thus never presented evidence on the reliability of hypnosis in general.[8]

Although a defendant may not raise an issue on appeal which he failed to assert below (see *People v. Welch*, 8 Cal.3d 106, 114-115; *People v. Boothe*, 65 Cal.App.3d 685, 690), we recognize that a defendant may claim that such error deprived him of a crucial defense and reduced his trial to a farce or a sham. (*People v. Ibarra*, 60 Cal.2d 460, 464.[9]) The burden is on the defendant, though, to establish his counsel's ineffectiveness. Moreover, proof of the ineffectiveness must be a demonstrable reality and not a speculative matter. (*People v. Martinez*, 14 Cal.3d 533, 538.)

From the record in the instant case we have determined that this error did not reduce the trial to a farce or a sham. All three psychiatrists, including the two defense psychiatrists, agreed that hypnosis was a valid and reliable technique for improving recollection. Thus, the prosecution's failure to establish the reliability of hypnosis in general was not prejudicial.

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[8]Testimony of a witness concerning a matter on which his memory has been enhanced by hypnosis is admissible in other jurisdictions. (*Wyller v. Fairchild Hiller Corporation* (9th Cir. 1974) 503 F.2d 506, 509-510; *State v. Jorgensen* (Ore. App. 1971) 492 P.2d 312, 315; *Harding v. State* (Md.App. 1968) 246 A.2d 302, 306-312.) These courts have held that its credibility and weight are for the jury to determine.

[9]We note that on appeal appellate counsel, who also represented appellant at trial, do not raise the issue of *Ibarra* error.

The only issue on which the psychiatrists disagreed was whether the single photographic showup tainted the identification after the hypnosis.

2. *The Admission of Evidence of Prior Acts*

At the trial, two prosecution witnesses testified that appellant had threatened Dyanne with violence, had struck her, and threatened to "take care" of a friend of Dyanne who had helped her. The trial court instructed the jury that this evidence was received and could be considered only for the limited purpose of determining the identity of the perpetrator, a motive for the crime, and the existence of intent. (See CALJIC 2.50.) Appellant contends that the evidence should not have been admitted for any of these purposes.

Evidence Code section 1101, subdivision (b), provides that evidence that a person committed an act is admissible "when relevant to prove some fact [such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident] other than his disposition to commit such acts." We have determined that while the evidence was admissible to prove motive and identity, it was not admissible to show intent. This error, however, was not prejudicial.

Appellant contends that the evidence was not relevant to show the identity of the perpetrator because there were no common and distinguishing marks between the acts of violence and the hit-and-run murder of Dyanne. (See, e.g., *People v. Archerd*, 3 Cal.3d 615, 638-639.) Evidence of a defendant's prior threats and acts of violence against the victim of a crime of violence, however, is admissible to establish the identity of the defendant as the perpetrator since the prior threats against the victim indicate a pattern of conduct

by the defendant which logically tends to identify him as the perpetrator of the crime of violence against the victim. (*People v. Daniels*, 16 Cal.App.3d 36, 45-46; *People v. Small*, 7 Cal.App.3d 347, 355; cf. *People v. Hiser*, 267 Cal.App.2d 47, 63.) Thus, the evidence was admissible in this case since the prior threats of violence were directed at Dyanne, the murder victim in this case.

Appellant also contends that the evidence was inadmissible to prove motive and that even if it was admissible, the evidence was cumulative. Although motive is not an element of the prosecution's case, evidence of motive is relevant to show the identity of a person who commits the crime. Evidence of threats and violence by the defendant against the victim of a violent offense is admissible to show the defendant's motive. (*People v. Daniels, supra*, 16 Cal.App.3d at p. 46; *People v. Argentos*, 156 Cal. 720, 726.) Thus, the evidence in the present case was admissible to prove appellant's motive which was relevant to show the perpetrator's identity, an issue in this case.

Appellant also asserts that this evidence was cumulative to other evidence which showed appellant's feelings toward the victim and his concern about her living with another man. The evidence in question, however, was far more probative since it demonstrated that his feelings about their relationship, the divorce and child custody were more than the normal marital disillusionment and dissatisfaction.[10]

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[10]Appellant also asserts that the trial court should have excluded this evidence since its probative value was outweighed by its prejudicial effect. (Evid. Code, § 352.) Although the evidence was prejudicial since it indicated appellant was guilty, the evidence was very probative as previously noted.

Appellant also asserts that this evidence should not have been admitted to prove his intent. In *People v. Guerrero*, 16 Cal.3d 719, the California Supreme Court stated that evidence of prior crimes or acts may be used to prove intent "in cases where the proof of defendant's intent is ambiguous, *as when he admits the acts* and denies the necessary intent because of mistake or accident." (*Id.* at p. 726; *People v. Kelley*, 66 Cal.2d 232, 242-243.) The court noted that this type of evidence is normally admitted when there is no doubt that the defendant committed an act, but some question as to his intent in doing so. (*Ibid.; People v. Shader*, 71 Cal.2d 761, 776-777.) In the present case, the principal issue which the jury had to decide was the identity of the perpetrator of the offense. Once the identity of the perpetrator was determined, then the intent was established by the circumstances of the crime. Thus, since in the present case there was doubt as to whether appellant had committed the act, and he did not deny the necessary intent, this evidence should not have been admitted for this purpose.

This error, however, was not prejudicial. The evidence was properly received for the other two purposes. Even though it was admitted to prove intent, intent was established by other evidence in this case. Moreover, the challenged evidence was not strong probative evidence on appellant's intent at the time the crime was committed. That was essentially established by the circumstances of the crime.

3. *Evidence of Dyanne's Statements*

A prosecution witness, Wilma Michener, testified that in early 1974, appellant and Dyanne stayed at her Mammoth Lake's resort. Dyanne burst into the

Michener house crying and shaking and said appellant was trying to kill her with a knife. Dolores Melvin, another prosecution witness, testified that in December 1974, Dyanne came over to her house crying and shaking and stated, "My God, Dee, he's going to kill me." Appellant contends that these statements made by Dyanne were inadmissible and should have been excluded as hearsay. We do not agree.

Evidence Code section 1240 provides that: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." The theory underlying this exception is that the declarant's lack of opportunity for reflection and deliberate fabrication assures that the statement is trustworthy. (*Box v. California Date Growers Assn.*, 57 Cal.App.3d 266, 272.) If the statements were made under circumstances of nervous shock or excitement, they are admissible.[11] (*People v. Gonzales*, 269 Cal.App.2d 586, 591-592.)

In the present case, the statements were clearly made under shock and nervous excitement. In both cases, Dyanne came over to the witnesses' homes crying and shaking from the occurrences. This is sufficient evidence to establish that she was still in shock from the events. Her statements were thus admissible as spontaneous declarations.

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[11]Contrary to appellant's contention, there is no requirement that there be some evidence independent of the spontaneous statement itself of the occurrence of the event which caused the statement to be made. (*People v. Worthington*, 38 Cal.App. 3d 359, 366-367; *People v. Butler*, 249 Cal.App.2d 799, 804-805; Jefferson, California Evidence Benchbook, § 13.1, p. 161.)

Appellant further contends that the prejudicial effect of these statements outweighed their probative value and that their admission was cumulative. (See Evid. Code, § 352.) The trial court, however, did not abuse its discretion in admitting these statements since they were not cumulative and were probative of appellant's motive to kill Dyanne and such probative value outweighed the prejudice to appellant. (See *People v. Cooley*, 211 Cal.App.2d 173, 202, overruled on other grounds, *People v. Lew*, 68 Cal.2d 774, 778.)

4. *The Jury Venire*

Appellant contends that the jury venire was improperly produced by the clerk's office and that this error was compounded by the trial court's liberal excuse of potential jurors.[12] At the hearing on the motion for new trial, appellant produced evidence on the Santa Barbara County Jury Commissioner's policy. Under this policy some of the potential jurors are summoned to court by a letter sent through the mail. A second group is placed on "alert lists." If during a trial the first panel is exhausted deputy clerks phone individuals on the alert lists. The clerks all believed that they had the power to excuse jurors on their request. There are no written rules and regulations governing possible excuses. Appellant asserts that this procedure deprived him of a fair and impartial trial.

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[12]Respondent asserts that appellant is precluded from challenging the validity of these procedures because he did not object before the jury was sworn. (See *People v. Sirhan*, 7 Cal.3d 710, 751; *People v. Flowers*, 38 Cal.App.3d 813, 818; Pen. Code, § 1060.) Although appellant's counsel filed a declaration at the hearing on the motion for new trial stating that he was not aware of the procedures until after the completion of the trial, he could have learned of the procedures before the trial began. We have decided, however, to reach the merits of this issue.

Section 201 of the Code of Civil Procedure provides that: "In any county or city and county the judge of the superior court or a majority of the judges thereof may adopt *written* rules and regulations supplementary to such rules as may be adopted by the Judicial Council establishing a procedure whereby the jury commissioner of said county or city and county may be empowered to grant excuses from jury service to such prospective jurors who in the opinion of the jury commissioner qualify for excuses under Section 200." (Emphasis added.) Additionally, section 4.5 of the Standards of Judicial Administration recommended by the Judicial Council provides that:

"(a) Each court should adopt a policy governing the granting of excuses from jury service on grounds of undue hardship pursuant to Section 200 of the Code of Civil Procedure. The policy should incorporate the following principles:

"(1) No class or category of persons should be automatically excluded from jury duty except as provided in Sections 198 and 199 of the Code of Civil Procedure.

"(2) A person should be excused from jury service for undue hardship only if it is not possible to defer the person's jury service to a time within one year when no undue hardship would result.

"(3) Inconvenience is not an adequate reason for excuse from jury duty, although it may in the court's discretion be considered a ground for a temporary deferment of the obligation to serve.

"(b) For the guidance of judges and court or county officials charged with the duty of selecting lists of persons to serve as trial jurors, the policy adopted

pursuant to subdivision (a) should specifically provide that upon *written request* an excuse on the ground of undue hardship may be granted for any of the following reasons:

"(1) Excessive travel distance or lack of available transportation to the court.

"(2) Extreme financial burden, or undue risk of material injury to or destruction of the juror's property or property entrusted to the juror, where it is not feasible to make alternative arrangements to alleviate the financial burden or risk.

"(3) Physical or mental incapacity to serve as a juror, or disability that would entail undue risk of harm to the person's physical or mental health. The court may in any individual case require that the person furnish a letter from a physician specifying the nature and extent of the incapacity or disability, its probable duration, and the particular reasons why the person cannot or should not serve as a juror.

"(4) The prospective juror's services are immediately needed for the protection of the public health and safety, and it is not feasible to make alternative arrangements to relieve the person of these responsibilities during the period of service as a juror.

"(5) The prospective juror has a personal obligation to provide actual and necessary care to another, and it is not feasible to make alternative arrangements for that care. The court may in any individual case require that the person furnish a letter from a physician stating that the person being cared for is in need of regular and personal care.

"(6) Prior grand or trial jury service or a summons for jury service in any state or federal court during the immediately preceding 12 months." (Emphasis added.)

Appellant asserts that the "alert" system is defective because a clerk, without written standards, is making a judicial decision to excuse a juror for hardship and the excuse is not verified either in court or by an affidavit. (See Code Civ. Proc., § 246.)

Although it appears that the deputy clerks were not given written standards to follow in granting excuses to people on the alert lists, appellant has not established that he was prejudiced by this fact. The clerks did not randomly excuse people but only granted excuses if individuals had a prearranged vacation or business trip, personal illness or illness of an immediate family member, had a doctor's appointment, or worked in a one-person business. The defendant has the burden of establishing that this policy is an intentional, systematic discrimination against the persons of a certain class, economic status, or geographical location. (*People v. Gibbs,* 12 Cal.App.3d 526, 539.) In the present case, he has failed to meet that burden. Even though there appears to be errors and irregularities in failing to comply strictly with the statutory framework in making up the list, the list is not invalidated if there is no prejudice to the parties involved. (*People v. Langdon,* 54 Cal.App.3d 384, 391.)

5. *Failure to Dismiss the Charges*

Appellant contends that the trial court should have dismissed the charges pursuant to Penal Code section

1385[13] after two previous juries hung. Appellant asserts that he was denied due process because at the third trial the prosecution presented more polished evidence and because Sonia Gowda, a prosecution witness and his girl friend at the time of the murder, did not appear as a witness.

We note that the third trial of appellant did not violate double joepardy principles since jeopardy does not attach when a jury is discharged for failure to reach a verdict. (*People v. Wheeler*, 23 Cal.App.3d 290, 311.) Moreover, appellant was not subjected to cruel and unusual punishment by a third trial. (*People v. Terry*, 70 Cal.2d 410, 417-418.)

Appellant asserts that at the third trial, the prosecution presented a stronger case. This claim, however, is mere speculation. The defense might have also presented a stronger case after two previous trials.

The effect of Sonia Gowda's failure to testify at the third trial also is pure speculation. The prosecution wanted Ms. Gowda to testify at the third trial, but she refused to leave her residence in Canada to appear for a third time. Her testimony from the second trial was read into evidence by the prosecution and her picture was introduced by the defense. Thus, appellant was not denied due process because he was tried for a third time after two hung juries.

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[13]Penal Code section 1385 reads:

> "The court may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading."

In the present case, appellant made a motion in the trial court pursuant to this section.

DISPOSITION

The judgment is affirmed.

Cobey, *Acting P. J.*

We concur:

Allport, *J.*

Potter, *J.*

APPENDIX B.

Clerk's Office, Supreme Court, 4250 State Building.
San Francisco, California 94102

Dec. 15, 1977.

I have this day filed Order Hearing Denied.

In re: 2 Crim. No. 29766. People v. Quaglino.

Respectfully,

G. E. BISHEL
Clerk

In the Supreme Court of the United States

October Term, 1977
No. 77-1288

Supreme Court, U. S.
FILED
JUN 2 1978
MICHAEL RODAK, JR., CLERK

JOHN PHILIP QUAGLINO,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

No. 77-1288

RESPONDENT'S OPPOSING BRIEF ON PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

On September 30, 1977, a panel of three justices of the Court of Appeal of the State of California, Second Appellate District, Division Three, rendered an opinion affirming petitioner's conviction in the Superior Court of

the State of California for the County of Santa Barbara, for murder in the first degree in violation of California Penal Code section 187 in case 2d. Crim. No. 29766. The opinion was ordered unpublished. A copy of this opinion is attached to the petition filed with this Honorable Court as Appendix A.

Thereafter, petitioner petitioned unsuccessfully for rehearing in the Court of Appeal of the State of California. On December 15, 1977, the Supreme Court of the State of California denied his petition for hearing without opinion.

JURISDICTION

The grounds for jurisdiction of this Court urged by petitioner appear in the petition, page 2.

QUESTIONS PRESENTED

1. Should a petition for writ of certiorari be granted to consider the propriety of the admission of identification evidence in a state trial court where petitioner never raised a proper objection at or before trial as to the acceptance by the scientific community of hypnosis as a reliable technique for enhancing recollection of a witness for the purpose of identifying the suspect and where the intermediate appellate court to which certiorari is sought, accordingly, did not consider the issue on appeal, and further, where the evidence at issue does not involve a federal question?

2. Must an attorney's representation be regarded as constitutionally ineffective as a matter of law where the attorney failed to make an evidentiary objection at trial as to the reliability of an identification where trial defense counsel had successfully represented appellant through two prior trials of the same cause terminated by hung

juries, and where the three psychiatrists who testified concerning hypnosis, including two defense psychiatrists, agreed that hypnosis was one of the tools available to psychiatrists for attempting to improve memory recall?

STATEMENT OF THE CASE

The facts relating to the murder and appellant's subsequent identification as purchaser of the automobile used as the murder weapon are as set out in the opinion of the Court of Appeal (Appendix A to the Petition, pages 2-5, 6), as follows:

At approximately 6:30 a.m. on the morning of September 10, 1975, Dyanne Quaglino, the estranged wife of appellant,[1] was struck by a car and killed as she was jogging. The car did not stop and there were no automobile skid marks in the area where her body was found, which was unusual for this type of accident. Based on the description of a witness who had seen the car drive up the street but who had not seen the accident, the police located the car, a 1959 green and white Ford, that evening behind the apartment complex where appellant lived. Tire tracks and glass found at the scene of the accident matched up with this car. Additionally, fibers from Dyanne's clothing were found on the car's exterior.

In May 1975, Myron Jensen, who worked at a Chevrolet dealership, sold the car for a friend to a Richard W. Bellmore. Jensen kept the car at this house and did not sell the car through the dealership. After agreeing to buy the car and arranging to pick it up later, the purchaser drove

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[1]Dyanne had filed for divorce approximately five months before her death. [Notes 1 through 4 in this opposition appear in the opinion of the Court of Appeal of the State of California as notes 3 through 6.]

away in a 1970 brown Chevrolet station wagon.[2] Several days later the purchaser came to Jensen's place of employment and told him that the battery did not work. Jensen replaced the battery for him and gave him the smog certificates for the car.

The Santa Barbara County Sheriff's Department contacted Jensen on September 11 and asked him to describe the purchaser of the car. The deputies then showed him a 12 year old picture of appellant and asked him if he looked familiar. Jensen stated that the picture "struck a bell," but could not identify it. The following weekend the deputies showed Jensen seven pictures of bearded men, none of whom he could identify as the purchaser.[3]

The following week, the deputies and Dr. Frank Gott, a Santa Barbara psychiatrist, contacted Jensen about undergoing hypnosis to improve his memory of the person who had purchased the car. Jensen agreed and Dr. Gott hypnotized him. After Jensen came out of hypnosis, he was given a stack of seven photographs. He picked out appellant's picture as the man to whom he sold the car. At a lineup at the county jail a few days later, Jensen again identified appellant.

A handwriting expert testified at the trial that it was highly probable that the person who had written "Richard W. Bellmore" on the transfer document was appellant. Since appellant refused to give a handwriting exemplar of

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[2]The defense introduced evidence that appellant did not own nor have access to a car matching this description.

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[3]These pictures include the picture of Richard A. Bellmore, an out-of-state resident who was then a suspect in the case. Bellmore happened to be the last name of a male clubmate of appellant at business school.

the specific words, the expert could not give a more positive opinion.

A fingerprint expert testified that numerous prints were removed from the car and he formed the opinion that one of the fingerprints was appellant's. Two defense fingerprint experts, however, testified that although there were similarities between the prints, they could not positively identify the fingerprints as those of appellant.

The prosecution also produced evidence that Dyanne and appellant were separated, were involved in divorce proceedings, and had had disagreements over the property settlement and child custody. Several witnesses also testified that on several occasions, appellant had threatened to hurt Dyanne. One witness testified that appellant told him that Dyanne was an unfit mother and he was going to get the children back one way or another. Appellant also told one of Dyanne's friends that he was sorry he beat her.

Appellant testified in his own behalf. He denied that he had killed his wife. He stated that he was in bed with his girlfriend, Sonia Gowda, on the morning of Dyanne's death. He got up to jog around 6:00 a.m. on the morning of Dyanne's death and returned approximately 20 minutes later.[4] At 7:15 a.m. the sheriff's office called and told appellant to come over to the house of one of Dyanne's neighbors. He was then told that Dyanne had been killed by a hit-and-run accident. Appellant stated that he had never purchased nor seen the 1959 Ford which caused Dyanne's death.

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[4]Sonia Gowda's testimony was read into evidence by the prosecution and the defense introduced her picture. She testified that appellant went out jogging the morning of his wife's death, but had not been breathing heavy when he returned. When first questioned by law enforcement officers, however, she stated that appellant had not left the apartment.

At the hearing on the admissibility of this identification [of appellant as the purchaser of the automobile], three psychiatrists testified — one for the prosecution and two for the defense. Dr. Gott, the prosecution's expert who had also hypnotized Jensen, testified that the fact that Mr. Jensen had been shown the photograph would not affect his post-hypnosis identification because during the hypnosis session his mind was focused solely on the events surrounding the sale of the car. A later occurrence, such as the showing of this photograph, was not in his mind at the time of the sale of the car and thus would not affect his recall. The defense psychiatrists, Dr. Patterson and Dr. Wells, neither of whom had nearly as much experience with or confidence in hypnosis as Dr. Gott, did not agree with Dr. Gott and both indicated that the fact that Jensen had seen a previous picture of appellant might have influenced his choice after the hypnosis.

ARGUMENT

I

WHERE PETITIONER NEVER CLEARLY OBJECTED TO THE USE OF HYPNOSIS AS A TOOL TO HEIGHTEN RECOLLECTION OF WITNESSES, AND WHERE, FOR THAT REASON, THE INTERMEDIATE APPELLATE STATE COURT TO WHICH CERTIORARI IS SOUGHT, NEVER PASSED UPON THE ISSUE AND THE ISSUE WAS NOT CONSIDERED ON THE MERITS BY THE HIGHEST STATE COURT AND FURTHER, WHERE THE ISSUE INVOLVES A QUESTION OF STATE EVIDENTIARY LAW AND NO FEDERAL QUESTION, IT IS INAPPROPRIATE TO GRANT THE PETITION FOR WRIT OF CERTIORARI

Petitioner seeks to have this Honorable Court consider the propriety of hypnosis as a tool for law enforcement use for the purpose of identifying suspects. (Petn., pages 14-25, 29-39.) However, a threshold question, is whether this issue is properly before this Honorable Court.

Concerning petitioner's claim that the prosecution did not establish that hypnosis has been accepted by the scientific community as a reliable technique for enhancing or producing an identification of a suspect, respondent observes that petitioner never raised this claim at any time in the trial court. (RT Vol. A, B; Brief in Support of Motion to Exclude and Surpress Identification.)[5] On the contrary,

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[5]Appellant's "Brief in Support of Motion to Exclude and Suppress Identification" is contained in the file of the Superior Court of the State of California, the trial court. By an order of the Court of Appeal of the State of California dated March 25, 1977, the Superior Court file was made a part of the record on appeal.

the defense in essence conceded in the trial court that hypnosis was a scientifically reliable technique for producing or enhancing identification. (RT Vol. B, 133; RT Vol. C, 26A.) It is, of course, well established under California law that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection at trial on the ground sought to be urged on appeal. (*People v. Welch* (1972) 8 Cal.3d 106, 114-115, 104 Cal.Rptr. 217, 222, 501 P.2d 225, 230; *People v. Mabry* (1969) 71 Cal.2d 430, 441, 78 Cal.Rptr. 655, 661, 455 P.2d 759, 765; *People v. DeSantiago* (1969) 71 Cal.2d 18, 22, 76 Cal.Rptr.809, 811, 453 P.2d 353, 355); *see People v. Boothe* (1977) 65 Cal.App. 3d 685, 690, 135 Cal.Rptr. 570, 573; *People v. Young* (1970) 9 Cal.App.3d 106, 109, 87 Cal.Rptr. 767, 768.) Consequently, since appellant did not in the trial court challenge the validity of hypnosis as a technique for producing or assisting an identification, he was precluded from urging the point on appeal. This is only proper since by not raising the objection at the trial level, appellant has precluded the prosecution from presenting evidence to the trial court as to the reliability of hypnosis in aiding in the production or enhancement of an identification.[6]

Generally, a litigant must follow state procedures in raising federal questions. Thus, when state practice re-

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[6]Testimony of a witness concerning a matter as to which his memory has been enhanced by hypnosis has been held admissible in various jurisdictions. (*Kline v. Ford Motor Co. Inc.* (9th Cir. 1975) 523 F.2d 1067, 1069-1070; *Wyller v. Fairchild Hiller Corporation* (9th Cir. 1974) 503 F.2d 506, 509-510; *State v. Jorgensen* (Ore. App. 1971) 492 P.2d 312, 315; *Harding v. State* (Md. App. 1968) 246 A.2d 302, 306-312, *cert. denied* (1969) 395 U.S. 949; *see People v. Modesto* (1963) 59 Cal.2d 722, 732-733, 31 Cal.Rptr. 225, 231-232, 382 P.2d 33, 39-40 (overruled on another ground in *People v. Morse* (1964) 60 Cal.2d 631, 637 fn.2, 648, 649, 36 Cal.Rptr. 201, 204 fn.2, 212, 388 P.2d 33, 36 fn.2, 44.)

quires, the federal question must be raised before the trial court. (*See* Stern and Gressman, *Supreme Court Practice,* § 3.27 at page 120 (4th ed. 1969).) As noted above, California has such a rule.

In *Stembridge v. Georgia* (1952) 343 U.S. 541, 546-548, this Honorable Court held itself without jurisdiction to consider the case on the merits because the federal constitutional issue had not been raised in the trial court as required by state law, but was raised for the first time in a petition for rehearing addressed to the state intermediate court and the highest state court refused without opinion, to hear the case. This of course is similiar to the situation that occurred in the instant case. (*See* Opinion of the Court of Appeal, Appendix A to Petition, at pages 6-7.)

To grant the petition as to this issue would serve to discourage the full and fair consideration of such issues in state courts where such issues should receive initial consideration. Petitioners should not be encouraged to present issues where they can be properly considered and resolved.

Clearly, under these circumstances, the Petition for Writ of Certiorari should be denied for lack of jurisdiction as to the propriety of the identification made by the witness after hypnosis. (*Fuller v. Oregon* (1974) 417 U.S. 40, 50 fn.11; *Street v. New York* (1969) 394 U.S. 576, 582; *Stembridge v. Georgia supra,* at 546-547; *see also Hill v. California* (1971) 401 U.S. 797, 805; *Cardinale v. Louisiana* (1969) 394 U.S. 437; *Beck v. Washington* (1962) 369 U.S. 541, 550-553.)

Additionally, it is noted that petitions for certiorari should be granted only when substantial federal questions are at issue. (28 U.S.C. § 1257(3).) Here the issue involves only state law regarding the admissibility of evidence in state court and no federal question is presented.

Thus the petition for certiorari should not be granted. (*Cf. Labine v. Vincent* (1971) 401 U.S. 532, 539-540; *California v. Green* (1970) 399 U.S. 149, 171-172 (Burger, C.J. concurring).)

II

PETITIONER RECIEVED EFFECTIVE REPRESENTATION OF COUNSEL FROM HIS TRIAL DEFENSE COUNSEL AT TRIAL DESPITE THE FACT THAT TRIAL DEFENSE COUNSEL DID NOT OBJECT TO THE IDENTIFICATION EVIDENCE ON THE GROUND THAT THE IDENTIFICATION WAS MADE AFTER THE WITNESS HAD SEEN A PSYCHIATRIST WHO HAD SOUGHT TO ASSIST HIS RECALL THROUGH HYPNOSIS

Petitioner contends that he received inadequate representation from his trial defense counsel. (Petn., pages 25-28.)

California standards for adequacy of counsel are as set out in *People v. Cook* (1975) 13 Cal.3d 663, 672-673, 119 Cal.Rptr. 500, 506, 532 P.2d 148, 154:

> "Before a judgment may be reversed by reason of inadequacy of trial counsel it must appeal from the record 'that counsel's lack of diligence or competence reduced the trial to a "farce or a sham," ' within the meaning of People v. Ibarra, supra, 60 Cal.2d 460, 464-466 [citations omitted] or that he did not effectively supply to a defendant those skills and legal knowledge which we can reasonably expect from any member of the bar. . . ."

As noted in the opinion of the Court of Appeal, Appendix

A to Petition at page 7, under California law the burden is on the defendant to establish his counsel's ineffectiveness and proof of the ineffectiveness must be a demonstrable reality and not a matter of speculation. (*People v. Martinez* (1975) 14 Cal.3d 533, 538, 121 Cal.Rptr. 611, 614, 535 P.2d 739, 742.)

Within the federal system a conviction will not be disturbed unless a defendant's representation has been shown inadequate as to make his trial a farce, a sham or mockery of justice. (*United States v. Stern* (9th Cir. 1975) 519 F.2d 521, 524.) The accused has the burden of demonstrating that counsel failed to render reasonably effective assistance and that the result was a denial of fundamental fairness. (*United States v. Elksnis* (9th Cir. 1975) 528 F.2d 236, 238; *see generally Brubaker v. Dickson* (9th Cir. 1962) 310 F.2d 30, 37; *see Mc Mann v. Richardson* (1970) 397 U.S. 759, 771 (advice of counsel as to guilty plea must be "within the range of competence demanded of attorneys in criminal cases"); *Moore v. United States* (3d Cir. 1970) 432 F.2d 730, 736, 737 ("[T]he standard of adequacy of legal services as in other professions is the exercise of the customary skill and knowledge which normally prevails at the time and place.")

In *Beasley v. United States* (6th Cir. 1974) 491 F.2d 687, 696, it was stated that defense counsel "must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest." Respondent submits that the word "perform" was not used without purpose.

In the instant case, trial defense counsel was able to secure two mistrials based on deadlocked juries. (Petn., pages 4-5.) Trial defense counsel ably and conscientiously represented petitioner throughout the trial, and petitioner certainly received a fair trial. As noted in the opinion of the

Court of Appeal of the State of California (Appenidx A to Petition, page 7), the psychiatric testimony, including testimony of two defense psychiatrists, relating to hypnosis, agreed that hypnosis was a proper technique for improving recollection. (Motion to surpress pretrial identification: RT Vol. A, 6 [prosecution psychiatrist], 74, 109, 120 [defense psychiatrists]. At trial: RT 320-322 [prosecution psychiatrist], 1195-1196, 1303 [defense psychiatrists].) One of the defense psychiatrists admitted that hypnosis in some instances was used as one of the tools available to psychiatrists in an attempt to improve memory recall. (RT 1303.) The other defense psychiatrist conceded that hypnosis can be used to improve someone's rememberance of a particular event. (RT 1195, 1196.) Since both defense psychiatrists admitted that hypnosis was used in the psychiatric community to improve memory recall, the trial defense counsel certainly cannot be faulted for not raising the objection at trial that hypnosis could not properly be so used.

The determination of the Court of Appeal of the State of California that trial defense counsel rendered constitutionally effective representation to petitioner finds strong factual support in the record. Petitioner has presented nothing more than speculation and conjecture and has not shown ineffective assistance of counsel as a demonstrable reality. The opinion of the Court of Appeal of the State of California affirming petitioner's conviction should not be disturbed. The petition for writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, it is requested that the petition for writ of certiorari be denied.

Respectfully submitted,

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MOTION FILED
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1288

JOHN PHILIP QUAGLINO,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and BRIEF OF AMICUS CURIAE

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In the Supreme Court
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OCTOBER TERM, 1977

No. 77-1288

JOHN PHILIP QUAGLINO,
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THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE ("CACJ"), by its attorneys EPHRAIM MARGOLIN and NICHOLAS ARGUIMBAU hereby move the Court for an order permitting them to file the within brief in support of the petition for writ of certiorari in this case. This brief is being filed and served contemporaneously with the filing of the re-

sponse to the petition requested of the Solicitor General by this Court.

The petitioner assents to this motion. It is opposed by the People of the State of California.

Dated, San Francisco, California,
June 1, 1978.

EPHRAIM MARGOLIN,
NICHOLAS C. ARGUIMBAU,
By EPHRAIM MARGOLIN,
Attorneys for Amicus Curiae.

BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS

CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE ("CACJ") is a statewide organization of attorneys active in criminal defense. CACJ represents approximately 1500 lawyers in California. We appear amicus in cases of wide significance, especially when they raise novel constitutional issues of significant import to the criminal bar.

In addition, CACJ filed an amicus brief in support of the petition for hearing in the Supreme Court of California.

QUESTIONS PRESENTED

1. Whether the admission of the identification testimony of an eyewitness who has been subjected to hypnotic memory "enhancement," either generally or on the facts of this case, violates the defendant's right to confront the witnesses against him, in violation of the Sixth Amendment of the United States Constitution.

2. Whether the admission of the identification testimony of an eyewitness who has been subjected to hypnotic memory "enhancement," either generally or on the facts of this case, violates the due process standards under the Fifth Amendment of the United States Constitution for admissibility of evidence of eyewitness identifications.

ARGUMENT

INTRODUCTION

The use of hypnosis as a tool in criminal prosecutions is rapidly on the rise throughout the country. For the Court's enlightenment, one of the world's leading authorities in the field, Dr. Martin Orne,[1] has provided an affidavit (submitted under separate cover by this party) briefly reviewing the use and abuse of hypnosis in the criminal field. Of special concern to the amicus and to this Court should be the widespread problems this law enforcement "tool" is creating. As Dr. Orne points out, there are so few true authorities in the field and so many law enforcement agencies (and defense attorneys) using it to "augment" the memories of witnesses, that uniform nationwide guidance by the courts is necessary to prevent miscarriages of justice by the thousands.

There is a consensus among the authorities that hypnosis is at best a dangerous procedure which is "like a scalpel: you wouldn't want it wielded by your janitor, only by your surgeon."[2] And at worst, hypnosis can produce undetected and undetectable perjury, because the subject may be so completely convinced

[1]Nearly three decades ago Orne published the first discussion of hypnosis and the law: "Hypnotism, Suggestibility and the Law," 31 Nebr.L.Rev. 575 (1952). See also Orne, "The Nature of Hypnosis: Artifact and Essence," 58 Jour. Abnormal and Social Psychology 277-299, and Orne, "The Simulation of Hypnosis: Why, How and What it Means," 19 Int.Jour.Clin. & Exp. Hypnosis 183-210 (1971).

[2]Erika Fromm, quoted in Hilgard, "Hypnosis Is No Mirage," 86 Psychology Today 121-128, at 127 (November 1974).

of a false memory implanted through hypnosis that he or she can pass a lie detector test.[3]

The refusal of the California Supreme Court, by a 4-3 vote, to hear the present case was reported in the American Bar Association Journal, which stated in part:

> The master trial lawyer must be a kind of hypnotist, able to draw judge and jury into a world where only his words hold truth.
>
> But the time is fast approaching when hypnosis will assume an out-front role in the courtroom, and it is not the jurors, but the witnesses, who will be entranced.
>
> * * *
>
> The California Supreme Court refused by a 4-3 vote in December to hear the appeal of a murder conviction in which testimony induced under hypnosis played a major role.
>
> * * *
>
> *The court's decision is "incredible" and "horrible" to Dr. Ernest R. Hilgard, former president of the International Society of Hypnosis and director of the Stanford University Laboratory of Hypnosis Research. Dr. Martin T. Orne, current president of the society and a professor at the University of Pennsylvania, agrees. . . .*
>
> Hypnosis, even as an investigative tool, is unreliable and unpredictable, say the doctors. People can flat-out lie under hypnosis, and the examiner is no better equipped to detect the hypnotic lie

[3]Weinstein, Abrams and Gibbons, "Validity of the Polygraph with Hypnotically Induced Repression and Guilt," 126 Am.Jour. Psychiatry 143-146 (1970).

than any other kind. Even more serious, a willing hypnotic subject is more pliable than he normally would be, more anxious to please his questioner. Knowing even a few details of an event, often supplied in early contacts with police, may provide the subject with enough basis to create a highly detailed "memory" of what transpired, whether he was there or not.

After the hypnotic session, the subject may recall the hypnotically induced memory as an authentic one. It well may be authentic, but neither the subject nor anyone else can separate the "reproduction" from the "production," says Orne. Memory distortion occurs under hypnosis in the same ways it ordinarily occurs, but it is exaggerated, says Hilgard.

Dr. Martin Reiser, director of the Los Angeles Police Department's behavioral-sciences services, does not dispute what Orne and Hilgard say. But he argues that those problems should not prevent the use of a valuable investigative tool. Reiser also runs Law Enforcement Hypnosis Institute, Inc., a private profit-making corporation in Los Angeles. It has now trained nearly 300 persons, mostly police but also a few lawyers and one judge, in hypnosis.

Reiser says his students are highly trained and professional investigators, from all ranks of police, who are instructed not to trust the hypnotic information but to corroborate everything with independent proof. But there was no corroboration that Quaglino had bought the hit-and-run car in the Santa Barbara police case. . . .

* * *

[W]ith witnesses "contaminated" by the hypnotic process, totally convinced of the accuracy of their recall, Orne and Hilgard fear hypnotic evidence will assume unwarranted significance in the nation's courts as a magic test for truth.

"Hypnotized Witnesses May Remember Too Much," 64 ABAJ 187 (February, 1978). (Emphasis added.)

For reasons which follow, this Court can and should intervene to prevent the threat to criminal justice noted by the American Bar Association Journal from becoming a reality.

The facts of the case are set forth in detail in the petition filed on behalf of Quaglino;[4] consequently, this brief will concentrate on what the amicus perceives as the guiding legal principles.

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[4]It should be noted that the record was augmented in the California Supreme Court to include, in particular, expert testimony on hypnosis from the first trial, which resulted in a hung jury. That part of the record is properly before this Court. It should also be noted that the scientific publications relied upon by the petitioner were placed before the California Supreme Court and that under California and federal law such publications are judicially noticeable. See, *e.g.*, *People v. Kelly*, 17 C.3d 24, 35, 130 Cal.Rptr. 144, 549 P.2d 1240 (1976); *United States v. Addison*, 498 F.2d 741, 744-745 (D.C. Cir. 1974). Consequently, these publications are properly relied upon in this proceeding.

I. PERMITTING A PROSECUTION WITNESS TO TESTIFY TO IDENTIFICATION OF THE ACCUSED AFTER HYPNOTIC MEMORY "ENHANCEMENT," ABSENT PROPER SAFEGUARDS, DENIES THE DEFENDANT HIS RIGHT TO CONFRONTATION UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Confrontation Clause is made applicable to state criminal prosecutions through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

Basic to the right of confrontation is the right of cross-examination, *Pointer, supra,* 380 U.S. at 404. As the Court said in *Pointer,*

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.
>
> 380 U.S. at 405.

This Court, in requiring that counsel be present at pretrial lineups, relied in part on the threat to effective cross-examination which pretrial identification procedures frequently present:

> Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him. *Pointer v. Texas*, 380 US 400, 13 L ed 2d 923, 85 S Ct 1065.
>
> *United States v. Wade*, 388 U.S. 218, 236, 87 S.Ct. 192-6, 18 L.Ed.2d 1149 (1967).

Moreover, the Court has recently reaffirmed that *Wade* and *Gilbert v. California,* 388 U.S. 263, 18 L.Ed.2d 1178, 87 S.Ct. 1951 (1967), sought to preserve the right of confrontation from undue pretrial manipulation of witnesses. *Moore v. Illinois,* ..... U.S. ....., 54 L.Ed.2d 424 (1977).[5]

The danger perceived in *Wade* and *Moore* was that a pretrial procedure might so solidify a witness' views as to prevent effective cross-examination, thereby depriving the defendant of the Sixth Amendment right to confront his accusers. In other areas too, the Confrontation Clause is read to prevent reliance upon testimony which is solidified by pretrial suggestions. For instance, this Court noted in *California v. Green*, 399 U.S. 149, 159, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), which considered the applicability of the Confrontation Clause to the admissibility of prior inconsistent statements,

> . . . The main danger in substituting subsequent for timely cross-examination seems to lie in the

[5]See particularly the Court's reference to the danger that a witness who has once made an identification "will be predisposed to adhere to this identification in subsequent testimony at trial," and the suggestion that one function of counsel at a lineup could be "to cross-examine the [witness] to test [his or her] identification before it hardened." Note 5, 54 L.Ed.2d at 435.

> possibility that the witness' "[f]alse testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth." *State v. Saporen*, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939).

There is no practice in which false testimony is more "apt to harden and become unyielding to the blows of truth" than hypnosis. Absent a validation procedure such as that suggested by the petition below (*i.e.*, confirmation of the reliability of the procedure as viewed by the scientific community, under *People v. Kelly*, 17 C.3d 24, 130 Cal.Rptr. 144, 549 P.2d 1240 [1976] and *Frye v. United States*, 293 F. 1013 [D.C. Cir. 1923]) testimony of a prosecution identification witness who has undergone hypnosis on the subject of his testimony must be viewed as inadmissible as in violation of the defendant's rights of confrontation and cross-examination.

II. BY REASON OF THE HYPNOTIC PROCEDURES USED IN THIS CASE, THE EYEWITNESS IDENTIFICATION WAS NOT SUFFICIENTLY RELIABLE TO MEET THE REQUIREMENTS OF DUE PROCESS.

It is too well-established a principle to be questioned that:

> The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear,

> resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate.
>
> *Napue v. Illinois*, 360 U.S. 264, 271, 3 L.Ed.2d 1217, 79 S.Ct. 1173 (1959).

The principle is still very much alive. See, *e.g.*, *Codispoti v. Pennsylvania*, 418 U.S. 506, Note 6 at 517, 41 L.Ed.2d 912, 94 S.Ct. 2687 (1974). This Court's willingness to review the facts in eyewitness-identification cases is illustrated by the detailed factual discussion in *Manson v. Brathwaite*, ... U.S. ....., ... S.Ct. ....., 53 L.Ed.2d 140, 154-156 (1977).

There has been a great deal of ferment in the area of eyewitness identification in the last decade. In the famous "Wade Trilogy" of *United States v. Wade*, 388 U.S. 218, 18 L.Ed.2d 1149, 87 S.Ct. 1926 (1967); *Gilbert v. California*, 388 U.S. 263, 18 L.Ed.2d 1178, 87 S.Ct. 1951 (1967) and *Stovall v. Denno*, 388 U.S. 293, 18 L.Ed.2d 1199, 87 S.Ct. 1967 (1967), this Court recognized that the Constitution requires more than mere relevance to permit the admission of possibly unreliable eyewitness identifications, and that special safeguards such as presence of counsel are necessary during pretrial identification. In *Stovall* the Court held that it was a "recognized ground of attack upon a conviction" that a pretrial identification procedure was "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to deny due process.

In a number of subsequent cases relying upon *Stovall*, it was held that "unnecessarily" suggestive

pretrial identification procedures would be subject to an exclusionary rule. Following the holding of *Simmons v. United States*, 390 U.S. 377, 384, 19 L.Ed.2d 1247, 88 S.Ct. 967 (1968) that (at least in the context of a pre-*Stovall* conviction) exclusion will only be required when the pretrial identification procedure is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification," and the holding of *Neil v. Biggers*, 409 U.S. 188, 199, 34 L.Ed.2d 401, 97 S.Ct. 375 (1972) that the more stringent "unnecessarily suggestive" standard is inapplicable to pre-*Stovall* identifications because it is a prophylactic rule, the circuits split on the question of whether a post-*Stovall* identification procedure may be attacked as "unnecessarily" suggestive *(Stovall)* if it is not "impermissibly" suggestive *(Simmons)*.[6]

That narrow question was settled, however, in *Manson v. Brathwaite, supra,* this Court concluding that the *Simmons* standard was applicable to both pre- and post-*Stovall* identifications. *Manson* might be interpreted, as did the dissent, as one in which the Court "dismantle[d] the protections against mistaken eyewitness testimony erected a decade ago in [*Wade, Gilbert,* and *Stovall*]." However, the Court continued to recognize the *Simmons* standard of inadmissibility where there is "a very substantial likelihood of irreparable misidentification" 53 L.Ed.2d at 155 and

[6]See, *e.g.*, Grano, *"Kirby, Biggers* and *Ash:* Do any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?" 72 Mich.L.Rev. 719-798, at 773-779.

left open to attack identification procedures which, by interfering with the right of cross-examination, "go to the very heart—the 'integrity'—of the adversary process." Note 14, 53 L.Ed.2d at 140, quoting the concurring opinion in *Clemons v. U.S.*, 133 App. D.C. 27, 48, 408 F.2d 1230, 1251 (1968).

For reasons which are made very clear in the fact statement of the petition in this case, this is not the sort of case in which it is sufficient to rely upon "the good sense and judgment of American juries," *Manson, supra,* 53 L.Ed.2d at 155, to rectify misidentification, because hypnosis gives the semblance of reliability and scientific certainty where in fact there is none, and by its very nature interferes with the ability to cross-examine witnesses.

The key phrase in the *Simmons* standard is "irreparable misidentification." The Court has recognized in all the cases that the true danger of suggestive pretrial identification procedures is that an initial misidentification may not be rectifiable through the ordinary device of cross-examination, and that the purpose of the stringent rules adopted in the Wade Trilogy and subsequent cases is to mitigate that danger. The essential defect of hypnosis is that if there is misidentification it is inevitably irreparable. The California Court of Appeal's decision is incomprehensible unless read as having ignored the word "irreparable." A reversal by this Court is essential to demonstrate that the *Simmons* standard cannot be so construed.

Even under the best of circumstances, examples of convictions based upon false identification are legion.[7] When the unnecessarily suggestive procedure of single-photo show-up is combined with subsequent hypnotic memory "enhancement," those dangers are so great that the procedure "offend[s] those canons of decency and fairness which express [our] notions of justice," and truly "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 169, 172, 96 L.Ed. 183, 72 S.Ct. 205 (1952), cited in *Manson, supra,* 53 L.Ed.2d at 153. The present case gives this Court the opportunity and duty to demonstrate that it has not abandoned those principles.

CONCLUSIONS

The totality of the circumstances in this case demand that the decision of the California Court of Appeal be overturned, as in violation of the petitioner's Fifth and Sixth Amendment rights. While a flat rule that hypnotically-induced identifications are inadmissible may prove necessary, that issue need not be reached by the Court. Because of the widespread threat to the criminal justice system which hypnosis presents, however, the Court should hold that hypnotically-induced eyewitness identification is "imper-

[7]For numerous examples, see Grano, *supra*, 72 Mich.L.Rev. 719-798, Notes 112-114, 420-421 and accompanying text.

missibly suggestive," *Simmons, supra,* except under clear safeguards such as those suggested by Dr. Orne in the accompanying affidavit.

Dated, San Francisco, California,
June 1, 1978.

EPHRAIM MARGOLIN,
NICHOLAS C. ARGUIMBAU,
By EPHRAIM MARGOLIN,
Attorneys for Amicus Curiae.

MOTION FILED
JUN 2 1978

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1288

JOHN PHILIP QUAGLINO,
Petitioner,

VS.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

MOTION OF AMICUS FOR LEAVE TO FILE AFFIDAVIT OF MARTIN T. ORNE, M.D., Ph.D.
and
AFFIDAVIT OF MARTIN T. ORNE, M.D., Ph.D.

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Amicus, CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE ("CACJ"), who seek simultaneously and under separate cover to file an amicus curiae brief in support of the petition herein, hereby moves this Court for an order permitting the filing of an affidavit of MARTIN T. ORNE, M.D., Ph.D., an internationally recognized authority in the area of hypnosis.

Amicus recognizes that on certiorari this Court must concern itself primarily with the record below. However, Dr. Orne's affidavit is submitted for the

primary purpose of alerting this Court of reasons, apart from and in addition to the merits of petitioner Quaglino's case, why it is important for this Court to clarify the constitutional issues related to admissibility of identification testimony of a witness who has undergone hypnotic "enhancement" of recall.

Amicus believes that this submission falls within the letter and spirit of the traditional role of amici to bring before the courts important considerations which may not otherwise be addressed.

The petitioner assents to the motion. It is opposed by the People of the State of California.

Dated: May 30, 1978

EPHRAIM MARGOLIN,
NICHOLAS C. ARGUIMBAU,
By EPHRAIM MARGOLIN,
Attorneys for Amicus Curiae.

AFFIDAVIT OF MARTIN T. ORNE, M.D., Ph.D.
State of Pennsylvania, County of Philadelphia

Martin T. Orne, M.D., Ph.D., being first duly sworn, deposes and says:

1. I am Professor of Psychiatry at the University of Pennsylvania and senior attending psychiatrist at the Institute of Pennsylvania Hospital. In addition to the usual psychiatric training, I also have a Ph.D. in psychology and have been principal investigator of a major research group working on the nature of hypnosis and related phenomena since 1960. I am Past-President of the Society for Clinical and Experimental Hypnosis, President of the International Society of Hypnosis, and have been Editor of the International Journal of Clinical and Experimental Hypnosis since 1962. I serve on the editorial boards of major journals of psychiatry and psychology and have served as a reviewer of research proposals for such government agencies as the National Science Foundation, the National Institute of Mental Health, the Air Force Office of Scientific Research, and the Office of Naval Research. I have published over one hundred scientific articles. I have used hypnosis extensively in clinical practice, have taught hypnosis in many academic contexts, and have carried out extensive research on the nature of hypnosis. In the course of my work I have consulted for a number of law enforcement agencies as well as other agencies of the government on matters relating to hypnosis. I have served as an expert witness in both state and federal cases, in jurisdictions ranging from Maine to California.

2. For a brief review of the nature of hypnosis, see the section on hypnosis in the current *Encyclopedia Britannica,* of which I am senior author. Of particular relevance to the issues to be discussed below are the following papers which I authored: "The potential uses of hypnosis in interrogation" (In A. D. Biderman & H. Zimmer (Eds.), *The manipulation of human behavior.* New York: Wiley, 1961. pp. 169-215), "Antisocial behavior and hypnosis: Problems of control and validation in empirical studies" (In G. H. Estabrooks (Eds.), *Hypnosis: Current problems,* New York: Harper & Row, 1962. pp. 137-192), "Social control in the psychological experiment: Antisocial behavior and hypnosis" (*Journal of Personality and Social Psychology,* 1965, *1,* 189-200), and "Can a hypnotized subject be compelled to carry out otherwise unacceptable behavior?" *(International Journal of Clinical and Experimental Hypnosis,* 1972, *20,* 101-117). Germane to the issue of memory under hypnosis is the phenomenon of hypnotic revivification or age regression. I have personally conducted one of the major studies in this field ("The mechanisms of hypnotic age regression: An experimental study." *Journal of Abnormal and Social Psychology,* 1951, *46,* 213-225). I was also the senior scientist responsible for the most extensive controlled study of this phenomenon that has been carried out to date (O'Connell, D. N., Shor, R. E., & Orne, M. T. "Hypnotic age regression: an empirical and methodological analysis." *Journal of Abnormal Psychology,* 1970, *76* (Monograph Supplement No. 3), 1-32). This latter study extended over several years and was supported by the National Institute of Mental Health. At this time I am principal investigator of a major research effort directed at the study of the hypnotic phenomenon. My laboratory has been particularly active in relating normal memory to hypnotically induced amnesia.

3. Over the past several years there has been a sudden upsurge of cases throughout the country which have involved the use and misuse of hypnosis. I have personally been involved in a considerable number of these cases and have provided consultative assistance to either the prosecution or defense in a large number of cases. While there have been some isolated instances of confessions elicited under hypnosis, these clearly involved self-incrimination and thus have not been introduced in court. On the other hand, there have been a number of instances where hypnosis was used in an effort to exonerate the defendant. A classic example of this kind appeared last year in the People of the State of California v Jeffrey Alan Ritchie, an individual accused of killing a two and one-half year old child who, when confronted with an overwhelming amount of circumstantial evidence, requested that he be hypnotized to enable him to remember the details which he could not. Under hypnosis he relived the experience in an exceedingly dramatic fashion, apparently indicting his wife for the murder and clearing himself. I testified to the unreliability of hypnosis and to the undue weight the jury would give to a video tape of this compelling episode. Since video tapes were available, it was possible to document how

the defendant had inadvertently been led by the hypnotist and to show a number of intrinsic inconsistencies which clearly indicated that the version the defendant relived under hypnosis was, consciously or unconsciously, confabulated to serve the needs of his case. After extensive testimony, the Court ruled to exclude the hypnotic evidence because of its unreliability.

An analogous situation occurred only two months ago during the retrial of a convicted murderer in the State of Ohio v Papp where the Court had authorized that the defendant be hypnotized and he apparently exonerated himself, causing the press throughout the state to proclaim his innocence. Since video tapes were available, it was possible to document that the defendant in fact was simulating, and by insisting that a series of tests, which my laboratory had developed for the recognition of simulation, be adminstered by the lay hypnotist hired by the defense, we could document that the defendant had never actually been hypnotized.

While such abuses are a problem, they are relatively unusual compared to the increasingly widespread use of hypnosis to help victims and/or witnesses recall crucial aspects of a crime or to facilitate the identification of a criminal prior to their testimony in court.

4. To appreciate the problems inherent in the use of hypnosis with witnesses and victims, it is necessary to review the facts about the nature of the phenomenon and its effect on recall.

The phenomenon of age regression induced by hypnosis is among the most dramatic and widely known procedures designed to increase recall for events which happened many years ago. The hypnotized individual may be told that he is six years old and at his birthway party. As a consequence, he will begin to act, talk, and to some degree think as a child. He may play as a child would, address the friends who apparently were at his birthday party, and describe in detail the room where the party is occurring, the people who are in attendance, the presents he is receiving, and so on. The naturalness with which these descriptions are given and the conviction that is communicated by the individual are compelling even to trained observers. The feelings which are expressed appear appropriate to a child more than to an adult, and the entire phenomenon is such that it is generally described as beyond the skills of even an outstanding actor. Finally, the material that is recovered during hypnotic age regression in a therapeutic setting is often of great importance to a patient's treatment. As Freud discovered at the end of the 19th century, the reliving of some of the traumatic events may result in the cure of troublesome hysteric symptoms, again lending credence to the historical accuracy of these events. For these reasons, there is a widely held belief among both laymen and practicing clinicians that the events relived during hypnotic age regression are historically accurate.

More recent work has shown that some of the events which patients relive in treatment may accurately reflect the emotions of the individual but need not accu-

rately portray actual historical events. Indeed, many such relived episodes actually combine several experiences. This fact in no way detracts from the usefulness of reliving these events in treatment where the purpose is to help the patient gain relief from his symptoms rather than to establish historical facts.

Experimental work with hypnotic age regression is possible because hypnosis is a phenomenon that can readily be induced in normal individuals. With sufficient effort it is possible to obtain materials that an individual will not have seen since he was six years old, then to age regress him back to that time and, while he is talking, acting, and writing like a child, to have him produce these same materials—for example, childhood drawings. The drawings that are produced superficially resemble those of a child. Until they are compared to what the individual had actually produced, one tends to accept them as "typical" of what a six-year old might have done. Analysis by experts quickly reveals that this is not the case, and when such drawings are compared with the actual drawings, it becomes obvious that the material obtained in age regression shows "sophisticated oversimplification."

As early as 1932, Stalnaker and Riddle ("The effect of hypnosis on long-delayed recall." *Journal of General Psychology,* 1932, *6,* 429-440) age regressed deeply hypnotized subjects to grade school where they had once learned *The Village Blacksmith* by Longfellow. In hypnosis these subjects appeared to be able to recite the poem far more easily with far better re-

call than in the wake state. Careful analysis, however, showed that there was only little additional recall; rather, a pronounced tendency to confabulate, i.e., make up, superficially appropriate sections for the words that could not be recalled in a style that resembled Longfellow. Often these confabulations were sufficiently good not to be recognized as such by a casual listener. This study first clearly established that there are two tendencies in hypnotic age regression: (1) a modest increase in the amount of material available to memory, and (2) a tendency a confabulate, to fill in those aspects which the individual cannot remember in an effort to comply with the suggestions of the hypnotist.

In subsequent research we have repeatedly documented both processes occurring within the same age regression session: an apparent increase in recall as well as an increased tendency to confabulate, to make up suitable memories, using whatever information was previously available to the individual. There were many times when subjects provided us with what appeared to be factual material relating to events that had occurred many years ago, i.e., their schoolmates who sat next to them in first grade. The subject would describe his classmates so vividly and with such conviction that we were surprised indeed to find that these individuals had not been members of the subject's class when we went to the trouble of checking the actual school records.

5. Because of the two tendencies which are facilitated by hypnosis, increased recall and increased con-

fabulation, it is extremely difficult to know which aspects of hypnotically aided recall are historically accurate and which aspects may have been confabulated. The details of material that is confabulated depend upon the subject's total past experience and all relevant cues that had been made available to him in the past. Subjects will use cues previously provided in the wake state in an inconsistent and unpredictable fashion; in some instances such cues are incorporated in the confabulated material, while in others the hypnotic recall may be virtually unaffected by them.

As a consequence of these limitations, I have found hypnosis dramatically useful in some instances where I have used it to help bring back forgotten memories of witnesses to crimes, while in others a witness might, with the same conviction, produce data that is totally inaccurate. This means that material produced during hypnosis or immediately after hypnosis, inspired by hypnotic revivification, may or may not be historically accurate. As long as this material is subject to independent verification its utility is considerable and the risk attached to the procedure minimal. However, there is no way by which a psychologist or psychiatrist, even with the most extensive experience in the field of hypnosis, can differentiate between an actual memory or a confabulation in a particular case without independent verification. Thus, there are many instances when subsequently verified accurate license numbers were recalled in hypnosis by individuals who previously could not remember them; by the same token, however, a good many license numbers which witnesses recalled turned out to belong to individuals where neither they nor their cars could possibly have been implicated. Unfortunately, a witness who is uncertain about his recall of a particular set of events can, with hypnosis, be helped to have absolute subjective conviction about what had happened, though the certainty can as easily relate to a confabulation as to an actual memory.

While under normal circumstances memory distortions may occur, the use of hypnosis can well nigh guarantee that a responsive subject develops subjective certainty about what has happened. He may come to believe that he can identify someone with certainty even though he had never actually seen him. By the same token, of course, he may also correctly recall that he had never seen the individual, or in another instance it will turn out that he did catch enough of glimpse to be able to bring an accurate image to mind. The crucial fact is that neither the subject nor the expert observer can distinguish between confabulation and accurate recall in any particular instance. The only way that can be done is on the basis of external corroborative data.

6. Recognizing the nature of the phenomenon, it becomes clear that hypnotizing either a victim or a witness, while not infringing upon their rights (unless it turns out they were an accomplice), certainly compromises the rights of an individual who is incorrectly identified. Courts have in the past tended to recognize that information obtained under hypnosis may not be accurate, that it may be confabulated,

and that a deeply hypnotized individual is capable of actually lying. Further, it is acknowledged that a jury or even a judge unfamiliar with the dramatic impact of the hypnotic phenomenon may easily be unduly influenced and may, therefore, give inappropriately great weight to the material brought forth under hypnosis—even if it is explained that this material is not historically accurate. For these reasons and because proper cross examination cannot be carried out, courts have generally held that testimony given under hypnosis is not admissible, a ruling which seems eminently appropriate in view of the ease with which even trained psychiatrists or psychologists are misled by material produced by the hypnotized individual.

Largely unrecognized, however, has been the potential effect of hypnotic techniques designed to "refresh the memory," *i.e.*, facilitate recall of a witness. Starting over three years ago the Los Angeles Police Department began training detectives in the use of hypnosis in interrogation. This program, under the supervision of a psychologist, has been enthusiastically endorsed by the police officer students and has inspired interest in police departments across the country. Not only have police officers come to Los Angeles to obtain training, but lay hypnotists in several parts of the country have been engaged by police departments to provide "training" so that their detectives may utilize this modality in their work. Even the Federal Bureau of Investigation has had great interest in the use of hypnosis, and while it has been their

policy to engage competent psychiatrists or psychologists to induce hypnosis, they have trained special agents to carry out interrogation during hypnosis once it has been induced.

As was discussed earlier, there is no doubt that hypnosis can be a useful investigative tool when a witness is enabled to remember verifiable factual information which provides new leads to the solution of a crime. Provided the witness or victim is willing, I can see no reasonable objection to the use of hypnosis in this manner as long as the material remembered during hypnosis is not subsequently used in court as part of the testimony given by an eyewitness. It is in that context where an ever increasing number of abuses are encountered.

7. To fully appreciate the problems which may follow from a hypnotic session, it is necessary to recognize the scientific fact that a deeply hypnotized individual who is asked to remember or describe something which occurred while he was asleep or not actually present will, with sufficient suggestive pressure, almost always produce something which appears to be a memory. This is best illustrated by the phenomenon of age progression where a subject is told that it is the year 2000 and asked to describe the world around him. Such a suggestion given to the deeply hypnotized individual, will lead to a vivid and compelling description of all kinds of new, as yet unseen, scientific marvels. Obviously, the plausibility and the precise nature of the subject's description will

depend upon his scientific knowledge, his reading, and his intelligence.

The same process that is involved in permitting an individual to hallucinate the environment of the year 2000 can also be involved when he is urged to recall what happened six months ago, especially if he lacks the memory traces to permit him to remember accurately. Unfortunately, such pseudomemories can and often do become incorporated into the individual's memory store as though they had actually happened. It is worth noting that this can occur even with bizarre memories such as when people "recall" their past lives and become convinced that these events really took place or, in other instances, when individuals under hypnosis remember encounters with flying saucers and become convinced they have actually communicated with beings from another galaxy. In such instances, the sophisticated listener smiles about the individual's assertions since it is obvious that they represent pseudomemories. Unfortunately, if such pseudomemories relate to events which occurred six months ago and are eminently plausible, there is no way for either the hypnotist or the subject or the finder of fact to distinguish between them and actual recall of what occurred.

The content of pseudomemories when they are wittingly or unwittingly induced during hypnosis is, of course, not random. If someone has just seen a science fiction film, one can usually recognize elements of that film in his description of what is going on about him in the year 2000; similarly, if a witness is hypnotized

and has factual information casually gleaned from newspapers or inadvertent comments made during prior interrogation or in discussion with others who might have knowledge about the facts, it is inevitable that many of these bits of knowledge will become incorporated and form the basis of pseudomemories. Furthermore, if the hypnotist has beliefs about what actually occurred, it is virtually impossible for him to prevent himself from inadvertently guiding the subject's recall so that he will eventually "remember" what he, the hypnotist, believes actually happened. It must be emphasized that we are not usually dealing with a conscious effort on the part of the hypnotist to distort a witness's memories: on the contrary, the process of cuing the hypnotized subject is usually outside of the hypnotist's awareness.

In every instance I have examined where tapes have been available of sessions conducted under hypnosis there are clear examples of explicit and implicit suggestions to the subject which unmistakably communicate what is wanted by the hypnotist and/or other questioners. The nature of hypnosis is such that the individual's suggestibility is increased. Therefore, the risk of creating memories for an eyewitness, rather than merely bringing forth recollections that were not previously available, is tremendous. This is true even with a highly qualified psychiatrist or psychologist. For this reason, in research complex control procedures are utilized to evaluate the effects on unwitting communication to the subject, and the importance of these factors is generally recognized in all

research involving interaction with human subjects. Considering the ease with which one may unwittingly produce data in the laboratory where the scientist has been trained to work under standard conditions and in a neutral fashion, the likelihood of producing the memories the hypnotist hopes to find when he is a detective sergeant who has a profound commitment to a theory of a given crime seems overwhelming. Only the most stringent control procedures can reduce the likelihood of contaminating a witness.

8. There are a large number of instances where a victim or a witness is hypnotized and as a consequence significantly altered his recollection of the events surrounding a crime. Some of these new memories represent accurate recall while others are the consequence of confabulation. Unfortunately, without independent verification, it is simply not possible to know whether the changed memories reflect an augmented recall or whether they represent alterations in a witness's memory in ways congruent with the theories held by the investigating authorities and the hypnotist. I will cite only two examples from actual cases which illustrate the kind of problems that easily occur.

A. In 1975, at the Philadelphia Naval Base, two seamen recuperating from illness were working in an office with a Dutch door that was open out into a hallway. A black sailor, neither had previously met, walked by and returned a few moments later with a pistol, aimed at one of the sailors (Foley) and shot at

his head. Fortunately, Foley moved quickly and suffered only a grazing wound to his ear. The assailant fled the scene. Subsequently the two seamen, who themselves were not previously acquainted, were separately interrogated and shown pictures of individuals who might have fit the description and could have been in the area. The witness (Dann) identified one of the pictures. The victim (Foley) tried to identify someone but was unable to do so. Though he indicated that one picture looked much like the person, he could not identify him. Subsequently at a preliminary hearing, Foley was present when the witness, Dann, identified the assailant as Seaman Andrews who was, of course, also present. Foley, however, at that time again indicated that he could not identify Andrews as the assailant, though he looked like the person. The prosecution obtained Foley's consent to be hypnotized in order to better remember the events that had transpired. He was hypnotized by an experienced Navy psychiatrist. During the first session he was still unable to make an identification. However, during a second session he finally identified the assailant as Seaman Andrews, the person whom he had previously indicated he could not identify. He was now willing and indeed eager to testify that Seaman Andrews was his assailant.

At the General Court Martial, which took place at the Philadelphia Naval Base (U.S. v SA Kenneth Andrews), the issue of the role of hypnosis was raised by the defense and I was asked to testify as an expert. I pointed out the issues discussed earlier

and emphasized the fact that Seaman Foley's reaction to hypnosis would likely have been the same whether or not he could actually remember the assailant. Thus, if he continued to be unable to remember him—which was highly likely considering the difficulties encountered in eliciting the recollection—he would have been prone to confabulate an individual who appeared to be the most likely candidate. He had seen Andrews accused during the preliminary hearing and was aware that Dann had identified him with certainty and, further, that it was the general belief of the prosecution that Andrews was guilty. The hypnotic session changed his memory and, while he would now testify to what he erroneously believed his original memory to have been, he would in fact be testifying on the basis of what he had been led to recall during hypnosis, which was quite different from his actual earlier memories.

In that instance the military judge ruled that Foley could testify to those things which he had previously testified to, but since his memory was altered by hypnosis, he was not permitted to identify Andrews. In the week following this event, two individuals who had left for overseas the evening of the incident returned from Germany and independently corroborated Seaman Andrews' alibi, making it extremely unlikely that he was the actual assailant. In this case it is interesting that the effect of hypnosis on Foley's memory persisted, and well over a year after the event he still asserted his conviction that Andrews had in fact fired the shot which nearly killed him.

B. A more complex problem is is illustrated by a case involving a trial not yet completed (State of California v. Bickneli and State of California v. Terri Milligan and Karen Kirby). The witness in this case is a 14-year old girl whose sister, aunt, grandmother, and cousin were stabbed to death in their home. The witness lived with her mother and other sister in another house and had apparently been visiting at her grandmother's house with a girl friend. The individuals accused of the murder are a 19-year old cousin, another 15-year old girl who was his mistress, and a girl who had been the witness's closest companion, also 14 years old. The issue here is not the facts of the case but rather the inherent problems raised when the prosecution decided two days prior to the preliminary hearings to have Rayleen undergo hypnosis before she could be questioned by the defense.

Prior to this event, Rayleen had been interrogated extensively and had developed a good relationship with the interrogator. After initially denying being present during the murder, she admitted, 4 months after her initial questioning by the police, that she had been there and gave a variety of descriptions of the events which took place. Each description differed from the others in important aspects, though it is reasonably clear from the two taped interrogations that even in the wake state she was very responsive to leading questions from the interrogator. Overall, her reports were extremely inconsistent and, furthermore, she insisted that the whole episode was merely a

bad dream, she allowed it could have happened but asserted that she really did not believe this was so. Finally, she became quite emotional during the interrogation.

All of these factors were felt to mitigate against her effectiveness as a witness, and since she was the only witness, the prosecution stated that it was their hope that hypnosis would allow her to give her testimony more comfortably. The investigators and the psychiatrist who hypnotized her indicated that hypnosis was safer than sodium pentothal which she had originally requested so that she would be believed and could remember more accurately. The doctor also assured her that there would be no difficulty and implied that she would know, following hypnosis, that her memories had not been a dream. Rayleen was hypnotized and told a story whose major outlines were similar to material she had brought forth previously except that it was somewhat more consistent with what the investigator seemed to have been interested in, such as accounting for her arrival time at the house where the murder occurred. While the psychiatrist had induced hypnosis, the bulk of discussion during hypnosis was carried out by the investigator whom she apparently was very eager to please. Previously the witness had been unwilling or unable to answer the question of how she got home to the friend with whom she was staying. She had claimed that she must have passed out but she wasn't sure because it was only a dream. During the hypnotic session the hypnotist clearly implied that the events she described

had occurred and were not a dream. Rayleen also described how she was hit over the head and knocked out at the scene of the crime and woke up the next day in her friend's bed with a pain in her head.

This latter kind of memory is an example of what is termed a "screen memory" in psychiatry. It is a memory designed to make it unnecessary to recall other things which the patient does not wish to recall. This fact was recognized by the prosecution psychiatrist, who acknowledged that it was very unlikely she had actually been hit over the head; however, he felt it would not be to the patient's advantage to help her remember more. In sum, a story was obtained during hypnosis which clearly implicated the three suspects and Rayleen's screen memory was accepted as if it were true.

It is my understanding that under California law Rayleen's testimony, if she had been an accomplice, would have been considerably less useful, and in the absence of independent verification, it could not have been used.

The consequences of the hypnotic session were striking. Whereas before Rayleen's description of the events changed with every time she was asked to tell about them, there is now a consistent story; whereas previously she had insisted it was all like a dream, she now comes to accept the fact that it was not a dream, and by the time of trial is able to state with certainty that it was not a dream, a process which she clearly relates to the hypnotic session. Further, despite her age, she is now able to successfully resist any

attempt by counsel to question her certainty about what occurred. Whereas before hypnosis she was highly responsive to leading questions, after hypnosis her story has become fixed.

In this situation hypnosis clearly altered the nature of the witness. Instead of an uncertain, confused individual who gives an inconsistent description which she believes might well be a dream, it is now a self-assured young girl who appears thoroughly convinced about what actually happened, including the fact that she was hit over the head and could not remember what happened until she woke up in her friend's bed.

That she now is convinced, even about an aspect of her story which is an obvious falsehood, is particularly instructive. Thus, not only does the prosecution psychiatrist acknowledge that she was probably not hit on her head, independent of my own evaluation, but we also have the record of a physical examination conducted within 48 hours of the event where a physician failed to see any evidence of trauma (whereas a blow on the head sufficient to cause unconsciousness for such a long period would still be clearly recognizable for some time after the event, at least in the form of localized swelling and tenderness).

Here hypnosis has the effect of radically altering the nature of the witness. While much of the content that is remembered stays the same, the subjective conviction of the witness is entirely different, and she has selected specific contents of her past descriptions which she now sticks to consistently. We do not know the truth of what she asserts; however, the as-

pect of the story relating to being hit on the head, which is virtually certain to be untrue, is now told with complete conviction. Rayleen's experience of having told the story in hypnosis and having it accepted as real by both the psychiatrist and the interrogator seems to have made it real for her.

There is no way in which the process that has taken place could be reversed. The defense simply does not have the opportunity to cross examine the witness who existed prior to hypnosis. The hypnotic process was not utilized in this instance to obtain additional information but to alter the nature of the witness and to convince her that the events she related under hypnosis had actually happened that way. I know of no procedure which could change a witness as effectively as hypnosis in such a situation.

The misuse of hypnosis seems self-evident. The prosecution acknowledges that it was not primarily intended to obtain more factual information that could be verified, and the prosecution psychiatrist acknowledges that he was aware of the screen memory but chose not to explore the matter, thereby virtually foreclosing the possibility of the defense effectively exploring the matter under cross examination. Further, the prosecution psychiatrist under cross examination acknowledged that it is entirely plausible that the material which is concealed by the screen memory would actually implicate the witness either as a participant or an accessory to the crime.

9. The two cases cited above are merely illustrations of a large number of instances of cases with which I

am familiar, ranging from Florida to New Jersey, from Pennsylvania to the Middle and Far West. It is, of course, posssible with proper expert testimony to clarify the issues on a case-to-case basis. Unfortunately, there are few experts willing and able to present the facts to the courts. The number of serious research scientists working with hypnosis is limited, and it requires an intimate familiarity with both the research and the clinical literature to clarify the problems in any individual instance. The scarcity of experts needs to be juxtaposed with the fact that police officers are being trained in large numbers throughout the country, that it requires very little training to induce hypnosis, and that in many instances hypnosis is conducted without video tapes or, as in a current case in New Jersey, without any tape record at all, though here again the witness's memories were greatly altered.

The complexity of the issues is such that it requires appropriate testimony for the courts to fully appreciate the issues involved. The costs that every such trial involves are considerable, not only in terms of money but also in terms of scarce resources on the part of the courts as well as the prosecution and defense. Finally, the issues seem to involve the most basic rights of an individual to confront his accuser without having to be concerned that the accuser's mind has wittingly or unwittingly been altered by special procedures not well understood by the public at large.

10. The use of hypnosis and related techniques to facilitate memory raises profound, complex questions, and it is likely that the individual will only be protected if these issues are dealt with at the highest level of our court system. There are instances when hypnosis can be used appropriately provided the nature of the phenomenon is understood by all parties concerned. However, it must be recognized that the use of hypnosis by either the prosecution or the defense can profoundly affect the individual's subsequent testimony. Since these changes are not reversible, if individuals are to be allowed to testify after having undergone hypnosis to aid their memory, a minimum number of safeguards are absolutely essential:

A. Hypnosis should be carried out by a psychiatrist or psychologist with special training in its use. He should not be informed about the facts of the case verbally; rather, he should receive a written memorandum outlining whatever facts he is to know, carefully avoiding any other communication which might affect his opinion. Thus, his beliefs and possible bias can be evaluated. It is extremely undesirable to have the individual conducting the hypnotic sessions to have any involvement in the investigation of the case. Further, he sould be an independent professional not responsible to the prosecution or the investigators.

B. All contact of the psychiatrist with the individual to be hypnotized should be video taped from the moment they meet until the entire interaction is

completed. The casual comments which are passed before or after hypnosis are every bit as important to get on tape as the hypnotic session itself. (It is possible to give suggestions prior to the induction of hypnosis which will act as posthypnotic suggestions.)

Prior to the induction of hypnosis, a brief evaluation of the patient should be carried out and the psychiatrist should then elicit a detailed description of the facts as the witness or victim remembers them. This is important because individuals often are able to recall a good deal more while talking to a psychiatrist than when they are with an investigator, and it is important to have a record of what the witness's beliefs are before hypnosis. Only after this has been completed should the hypnotic session be initiated. The psychiatrist should strive to avoid adding any new elements to the witness's description of his experiences, including those which he had discussed in his wake state, lest he inadvertently alter the nature of the witness's memories—or constrain them by reminding him of his waking memories.

C. No one other than the psychiatrist and the individual to be hypnotized should be present in the room before and during the hypnotic session. This is important because it is all too easy for observers to inadvertently communicate to the subject what they expect, what they are startled by, or what they are disappointed by. If either the prosecution or the defense wish to observe the hypnotic session, they may do so without jeopardizing the integrity of the session through a one-way screen or on a television monitor.

D. Because the interactions which have preceded the hypnotic session may well have a profound effect on the sessions themselves, tape recordings of prior interrogations are important to document that a witness had not been implicitly or explicitly cued pertaining to certain information which might then be reported for apparently the first time by the witness during hypnosis.

11. It should be emphasized that the safeguards outlined above are necessary whenever there is any *possibility* that a witness or victim would be asked to testify in court as an eyewitness. They would not be necessary if there is no such possibility. On the other hand, it is crucial to recognize that if hypnosis is used during an investigative process without these minimal safeguards, the subsequent testimony of the witness or victim in court can no longer be evaluated. Since the hypnotic phenomenon makes it possible to irreversibly alter memory, these safeguards are essential to assess whether hypnosis is likely to have tampered with the evidence in the witness's mind. It is possible for experts to evaluate these data and, if necessary, objectively establish the kind of changes that have taken place in a witness's recollections following hypnosis, and determine whether these can be traced to specific cues which were made available to the individual. Only such an assessment would allow the finder of fact to make an informed decision about an eyewitness report of a witness or victim who had been hypnotized. Without such safeguards, recollec-

tions "facilitated" by hypnosis are *less* reliable than normal recall and should not be allowed in court.

Inevitably it will be argued by some that hypnosis has only been used to facilitate memory and that its possible distorting effects are minimal and can, as a practical matter, be ignored. Not only do such arguments fly in the face of scientific evidence but the reason why hypnosis is receiving such attention by law enforcement agencies is because it is recognized as an effective tool, capable of facilitating (or altering) recollections. The testimouy of a witness whose memories have been altered by hypnosis has all the pitfalls of testimony given during hypnosis, with the additional insidious complication that the effects exerted by hypnosis are no longer obvious.

Finally, it will be argued that the safeguards outlined above are not feasible as a practical matter, that they would interfere with the ready use of hypnosis in the course of criminal investigations. While it requires additional thought prior to the use of hypnosis, following the guidelines would actually improve the quality of the investigative use of hypnosis. However, there is no real choice since it is the only way that the rights of the defendant can be protected. The guidelines do not place an onerous burden on the investigating authorities; rather, analogous to the rules preventing the admission of coerced confessions, the insistence of such guidelines will minimize the likelihood of creating a false eyewitness. Only a clear ruling protecting the defendant's rights if eyewitnesses have

been hypnotized prior to their testimony in court will prevent the widespread, uncontrolled misuse of this technique as training in the modality becomes increasingly widespread among our country's local, state, and national police forces.

/s/ Martin T. Orne

Subscribed and sworn to before me
this 25th day of May, 1978

/s/ J. L. Purfield
Joseph L. Purfield
Notary Public, Phila., Phila. Co.
My commission expires July 14, 1980